No. (1)

In The

Supreme Court of the United States

GROS VENTRE TRIBE, ASSINIBOINE TRIBE, AND FORT BELKNAP COMMUNITY COUNCIL,

Petitioners,

v.

UNITED STATES, BUREAU OF LAND MANAGEMENT, BUREAU OF INDIAN AFFAIRS, AND INDIAN HEALTH SERVICE,

Respondents.

On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case concerns the proper interpretation of § 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, as well as the proper construction of treaties and agreements between the United States and the Gros Ventre and Assiniboine Indian Tribes ("Tribes") of the Fort Belknap Indian Reservation in north-central Montana.

The questions presented are:

(1) Should certiorari be granted to resolve a conflict among the circuits as to whether the waiver of sovereign immunity in § 702 of the APA is limited by the final agency action requirement of § 704 or the judicial review provisions of § 706 of the APA?

(2) Should certiorari be granted to resolve a conflict among the circuits as to whether this Court's opinions addressing Tribal claims for money damages under the Tucker Act limit this Court's opinions addressing Tribal claims for equitable relief under Treaties and the common law Indian Trust doctrine?

LIST OF PARTIES AND PARTIES TO THE PROCEEDINGS BELOW

Petitioners Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community reside on the Fort Belknap Indian Reservation, a 652,000 acre tract of land in north-central Montana. Petitioner Fort Belknap Indian Community Council is the governing body of the Tribes. Petitioners were appellants in the court of appeals and plaintiffs in the district court.

Respondents are: the United States; the Bureau of Land Management, an agency of the United States Department of Interior: the Bureau of Indian Affairs, an agency of the United States Department of Interior; and the Indian Health Service, an agency of the United States Department of Health and Human Services. Respondents were appellees in the court of appeals and defendants in the district court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Gros Ventre Tribe, Assiniboine Tribe, and the Fort Belknap Indian Community state the following:

> No party to this petition or to the proceedings below is a corporation, or a parent of publicly held company of a corporation.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1-27) is published at 469 F.3d 801 (9th Cir. 2006). The opinion of the district court (App., *infra*, 40-58) is published at 344 F.Supp.2d 1221 (D. Mont. 2004). The June 28, 2004 opinion of the district court (App., *infra*, 28-39) is unreported. The May 29, 1998 decision of the Interior Board of Land Appeals is reported at 144 IBLA 168, 1998 WL 344223 (I.B.L.A.) (May 29, 1998).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on November 13, 2006. The court of appeals denied a petition for rehearing on March 16, 2007 (App., *infra*, 59). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

TREATIES AND STATUTORY PROVISIONS INVOLVED

Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749 (App., *infra*, 61-68).

Treaty with the Blackfeet, Oct. 17, 1855, 11 Stat. 657 (App., *infra*, 69-78).

An Act to Ratify and Confirm an Agreement with the Gros Ventre, May 1, 1888, 25 Stat. 113 (App., *infra*, 79-89).

Agreement with the Indians of the Fort Belknap Indian Reservation in Montana, 29 Stat. 350 (1896) (App., *infra*, 90-98).

5 U.S.C. § 702 provides, in relevant part, as follows:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. . . . Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 704 provides, in relevant part, as follows:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise

requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 706 provides, in relevant part, as follows:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. . . .

25 U.S.C. § 71 provides as follows:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired. . . .

28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1505 provides as follows:

> The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive

> orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

42 U.S.C. § 4332(2)(C) provides, in relevant part, as follows:

> The Congress authorizes and directs that, to the fullest extent possible . . . all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action, . . . any adverse environmental effects which cannot be avoided should the proposal be implemented, . . . alternatives to the proposed action, . . . the relationship between local short term uses of man's environment and the maintenance and enhancement of long term productivity, and . . . any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

STATEMENT OF THE CASE

I. Treaties and Statutory Background

This case raises issues of profound importance involving the proper construction of treaties and agreements entered into by the United States government with Native American Tribes, including the petitioning Tribes – the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Reservation in Montana. This case also raises the

important question of whether the waiver of sovereign immunity for nonmonetary claims against the United States in § 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, is limited by other provisions of the APA.

A. Treaties

In 1851, the Treaty of Fort Laramie was executed among several Indian nations, including the "Assinaboines" and "Gros-Ventre Mandans," and the United States government. Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749 (App., *infra*, 61-68). In exchange for the Tribes' promise to "abstain in future from all hostilities whatever against each other," *id.* at art. 1 (App., *infra*, 61), "make an effective and lasting peace," *id.*, and make "restitution or satisfaction" for "wrongs" committed by them against United States citizens who may be "lawfully residing in or passing through their respective territories," *id.* at art. 4 (App., *infra*, 62), the signatory Indian nations were promised that the United States would "protect" them against "all depredations" committed by the people of the United States. *Id.* at art. 3 (App., *infra*, 62).

The Treaty of Fort Laramie also recognized and acknowledged territories for the various signatory Indian nations. *See id.* at art. 5 (App., *infra*, 62-63). It was nevertheless made clear that, in making this recognition and acknowledgment, the Indian nations did not "abandon or prejudice any rights or claims they may have to other lands" or "surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." *Id.* (App., *infra*, 64).

Four years after the signing of the Treaty of Fort Laramie, the United States government entered into the Treaty with the Blackfeet, Oct. 17, 1855, 11 Stat. 657 (App., *infra*, 69-78), by which the parties promised peaceful relations among the Tribes, between the signatory Tribes and other Tribes, and between the Tribes and the United States. *Id.* at art. 1, 2 (App., *infra*, 69-70). The territories established by the Treaty of Fort Laramie were modified by the new treaty. *Id.* at art. 4 (App., *infra*, 71-72).

The Treaty with the Blackfeet required the signatory Indian Tribes to "acknowledge their dependence on the Government of the United States," promise not to commit any "depredations or other violence" against U.S. citizens and allow them to "live in and pass unmolested" through Indian territories, and "deliver such individual[ ]" Tribal members to United States authorities for "trial and punishment" for any depredations committed by them against United States citizens. *Id.* at art. 11 (App., *infra*, 74). In return for these promises, the United States promised to "protect said Indians against depredations and other unlawful acts which white men residing in or passing through their country may commit." *Id.* at art. 7 (App., *infra*, 72).

B. Congressionally-Ratified Agreements

In 1871, treaty-making formally ended, Appropriations Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C. § 71 (2000)), although obligations in any treaties "made and ratified with any such Indian nation or tribe prior to March 3, 1871" were deemed not to be "invalidated or impaired." *Id.* As a result, formal treaty

making with Indian nations ceased, but more than 70 agreements between tribes and the United States were entered into and approved by Congress, usually by way of legislation. *See* Robert Laurence, *A Paradigmatic, Comparative, Private-Law Perspective on the Federal Trusteeship*, 46 NAT. RESOURCES J. 463, 471 (2006) (citing Francis Paul Prucha, American Indian Treaties: The History of a Political Anomaly (1994)).

Two such agreements pertain to the Gros Ventre and Assiniboine Tribes. In 1888, Congress ratified an act to reduce the territory of the Gros Ventre and other Indian Tribes. An Act to Ratify and Confirm an Agreement with the Gros Ventre, ch. 213, May 1, 1888, 25 Stat. 113 (App., *infra*, 79-89). Through this "1888 Agreement," Congress created the original Fort Belknap Indian Reservation, an area of land specifically set aside for the use and enjoyment of the Indian tribes. The original Fort Belknap Reservation included the Little Rocky Mountains, which to this day are the headwaters for much of the Reservation's water resources, are considered sacred by Tribal members, and were traditionally used by the Tribes for hunting, fishing, cultural, and spiritual purposes.

The 1888 Agreement reserved to the Tribes the full use of all waters flowing to and entering Reservation lands, including all water, "undiminished in quantity and undeteriorated in quality," necessary to fulfill the purposes of the Reservation. *Winters v. U.S.*, 207 U.S. 564, 567 (1908). The 1888 Act was the subject of the seminal Indian law decision *Winters v. U.S.*, in which this Court held that the 1888 Agreement granted the Tribes full use of all waters flowing to and entering Reservation lands. *Id.* at 576. The 1888 Agreement did not replace or diminish any

of the promises made by the United States in previous treaties.

In the early 1880s, prospectors trespassing on the Reservation discovered gold in the Little Rocky Mountains. In 1896, Congress ratified another agreement, which later became known as the "Grinnell Agreement," by which the Tribes agreed to relinquish all mineral interests in the Little Rocky Mountains in return for certain monetary considerations. Agreement with the Indians of the Fort Belknap Indian Reservation in Montana, ch. 398, 29 Stat. 350 (1896) (App., *infra*, 90-98).

The report to the Senate accompanying the Grinnell Agreement stated that the Tribes "would not be giving up any of their timber or grass lands" and "would have ample water for all their needs." S. Doc. No. 54-117, at 3-4 (1896) (App., *infra*, 105). Indeed, the Senate Report reflects multiple reassurances that were made to the Tribes with regard to their water rights. *See*, *e.g.*, *id.* ("you will have all the water that you need"). For example, the Report states that the Tribes were reassured that they would retain "control of the waters of the streams having their sources in the mountains for much-needed irrigation and for domestic uses by the Indians," and that there would be "no irreparable damage . . . done the Indians by depriving them of these important benefits, which might be vital to their very existence." *Id.* at 3 (App., *infra*, 104); *see also id.* at 4 (App., *infra*, 105) (agency officials reporting that "the water rights of the Indians will not be in any way impaired by the cession" and that "they have retained enough wood and water for their uses for all time").

C. Section 702 of the Administrative Procedure Act

Section 702 of the APA waives sovereign immunity for any person who has suffered "legal wrong" due to the acts or failure to act of an agency or officer or employee thereof, acting in an official capacity or under color of legal authority when the relief sought does not include money damages. 5 U.S.C. § 702. "Legal wrong" means such wrong as particular statutes or the courts have recognized as constituting grounds for judicial relief. *See Kansas City Power & Light Co. v. McKay*, 225 F.2d 924, 932 (1955), 932, *cert. denied*, 350 U.S. 884 (1955) ("'legal wrong' means such wrong as particular statutes and the courts have recognized as constituting grounds for judicial review").

In amending the APA in 1976 to include § 702, the Judiciary Committee of both Houses identified, in their reports, the measure's clear purpose as the "eliminat[ion of] the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity." S. Rep. No. 996, 94th Cong., 2d Sess. 8 (1976); H.R. Rep. No. 1656, 94th Cong., 2d Sess. 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6129 (1976); *see also Schnapper v. Foley*, 667 F.2d 102, 107 (D.C. Cir. 1981) (the "legislative history of this provision could not be more lucid").

28 U.S.C. § 1331 provides that the "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Federal common law claims "arise under" the laws of the United States within the meaning of 28 U.S.C. § 1331. *See, e.g., Illinois v. City of*

Milwaukee, Wis., 406 U.S. 91, 100 (1972) ("section 1331 jurisdiction will support claims founded upon federal common law as well as those of statutory origin."); *Johnsrud v. Carter*, 620 F.2d 29, 31 (3d Cir. 1980) (federal common law claims "arise under" 28 U.S.C. § 1331); *see also Northwest Sea Farms, Inc. v. U.S. Army Corps of Eng'rs*, 931 F.Supp. 1515, 1519-20 (W.D. Wash. 1996) (Indian trust obligation constitutes "law to apply").

II. Factual Background

A. Cyanide Heap-Leach Gold Mining in the Little Rocky Mountains

Within a decade of the discovery of gold in the Little Rocky Mountains in the 1880s, and the subsequent "Grinnell Agreement" carving the territory out of the original Fort Belknap Reservation, the Little Rocky Mountains mining district became the state's largest gold producer. Mining largely ended in the early 1900s, but in 1979, the Montana Department of State Lands ("MDSL") granted Zortman Mining, Inc. ("ZMI"), a wholly owned subsidiary of Pegasus Gold, Inc., two permits to begin cyanide heap-leach gold mining in the Little Rocky Mountains within the "Grinnell" lands adjacent to and surrounded on three sides by the Reservation. MDSL prepared a draft "Environmental Impact Statement" for the two mines, and the Bureau of Land Management ("BLM"), a federal agency, approved of ZMI's plan of operations. *See Island Mountain Protectors, et al.*, 144 IBLA 168, 171 (May 29, 1998) (discussion of history of Zortman and Landusky mines).

Between 1979 and 1994, working jointly, the BLM and MDSL approved 15 expansions of the mining operations in the Little Rocky Mountains, more than doubling the size of

the original disturbance. *Id.* at 171-72. BLM undertook no additional environmental impact statements to evaluate these expansions. In 1996, the BLM prepared an "Environmental Impact Statement" pursuant to the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), to evaluate yet another proposed expansion of mining operations, and eventually approved additional mining at the Zortman mine even though it concurrently recognized that the mines were having a substantial negative impact on the Tribes' treaty-based water resources.

The Little Rocky Mountains form the headwaters of streams running onto the southern end of the Reservation. King Creek, Lodgepole Creek, and Bighorn Creek originate in the Little Rockies and flow onto the Reservation. Mining operations have diverted flows from the Little Rocky Mountains away from the Reservation, generated wastewater, waste rock, leach pads, and process wastes, and polluted a number of watersheds in the mountains, including those running onto the Reservation. The mines have leached, and continue to leach, acid rock drainage – an acidic brew of heavy metals – into surface and groundwaters hydrologically connected to the mines. There is an unquantified amount of recharge of waters impacted by mining activities in the limestone formations located in the mountains. These facts are undisputed.[1]

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[1] Furthermore, as a result of the mine operations, the Tribes' cultural and spiritual use of the mountains has been severely eroded; the BLM observed in one planning document that mining will have 100 plus years of significant disruption to Native American traditional cultural practices in the Little Rocky Mountains. Spirit Mountain, once the core of tribal religious practices in the mountains, is now entirely gone – replaced by enormous open pits.

Indeed, as the district court acknowledged:

> It is undisputed that the Zortman-Landusky mines have devastated portions of the Little Rockies, and will have effects on the surrounding area, including the Fort Belknap Reservation, for generations. That devastation, and the resulting impact on tribal culture, cannot be overstated.

Gros Ventre, et al. v. United States, et al., CV 00-69-M-DWM, Slip Op. (D. Mont. June 28, 2004) at 12 (App., *infra*, 38).[2]

In January of 1998, ZMI declared bankruptcy and announced its intention to cease operations at the mines. In response, the BLM developed and selected new closure and reclamation plans for the mine sites.

B. The District Court's Decisions

On April 12, 2000, in U.S. District Court for the District of Montana, the Tribes filed an equitable action against the federal government, including the BLM, alleging breach of the federal government's specific and general trust obligations to the Tribes in the permitting of

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[2] As a result of these impacts, in 1996, the Interior Board of Land Appeals ("IBLA") observed that the BLM had failed to obtain the information necessary about groundwater contamination from the mines to develop an adequate reclamation plan. *Island Mountain Protectors*, 144 IBLA at 201. In 1998, the IBLA held, *inter alia*, that in approving the mine reclamation plan, the BLM did not fully observe its trust responsibility to the Tribes and failed to protect public lands from unnecessary or undue degradation. *See id.* at 202-03. In light of these violations of the trust obligation and federal law, the IBLA halted the proposed expansion of the mines. *Id.* at 203.

the Zortman and Landusky cyanide heap-leach mines over the course of two decades, and the resulting destruction of Tribal trust resources.

In their prayer for relief, the Tribes requested that the district court: (1) declare the federal government in violation of its fiduciary duty to protect Tribal trust resources; (2) declare that the federal government's failure to comply with NEPA and other statutes, as well as its failure to fully reclaim the area, constitutes unnecessary and undue degradation in violation of the Federal Land and Policy Management Act, 43 U.S.C. § 1701, *et seq.*; (3) issue a writ of mandamus compelling the federal government to fully reclaim the area in fulfillment of its trust obligations; and (4) enjoin the further destruction of Tribal trust resources.

On January 29, 2001, the District Court denied the federal government's motion to dismiss the complaint. *Gros Ventre, et al. v. United States, et al.*, CV 00-69-M-DWM, Slip Op. (D. Mont. Jan. 29, 2001). In November of 2001, the District Court bifurcated the proceedings into liability and remedy phases. *Gros Ventre, et al. v. United States, et al.*, CV 00-69-M-DWM, Slip Op. (D. Mont. Nov. 30, 2001). In December of 2002, the parties exchanged summary judgment briefs. The District Court did not rule on the initial set of summary judgment briefs, and instead ordered the parties to renew their motions for summary judgment in light of this Court's opinions in *U.S. v. White Mountain Apache Tribe*, 537 U.S. 465 (2003), and *U.S. v. Navajo Nation*, 537 U.S. 488 (2003). Renewed summary judgment motions and briefs were exchanged in October through December of 2003.

On June 28, 2004, the District Court ruled against the Tribes and in favor of the federal government on the parties' renewed motions for summary judgment. *Gros*

Ventre, et al. v. United States, et al., CV 00-69-M-DWM, Slip Op. (D. Mont. June 28, 2004) (App., *infra*, 28-39). The District Court ruled against the Tribes on the issue of liability, even though damages had been bifurcated from liability, because it determined *sua sponte* that there was a "lack of an effective remedy for any wrongs committed on the Tribes" which "render[ed] the exercise of judicial power superfluous, and the case moot", *id.* at 11 (App., *infra*, 36), even though the Tribes – having adhered to the District Court's Nov. 30, 2001 Order bifurcating the proceedings – never had an opportunity to address the remedy issues for the court.

On July 12, 2004, the Tribes filed a Rule 59(e) motion under the Federal Rules of Civil Procedure for the court to alter or amend its judgment, based upon the procedural unfairness of deciding the action solely on remedy issues. On October 22, 2004, the court denied the Tribes' motion to alter or amend the judgment and reaffirmed its previous order. *Gros Ventre, et al. v. United States, et al.*, CV 00-69-M-DWM, Slip Op. (D. Mont. Oct. 22, 2004) (App., *infra*, 40-58). The October 22, 2004 order was reissued, *nunc pro tunc*, on November 12, 2004.

C. The Ninth Circuit's Decision

Following issuance of final judgment by the District Court, the Tribes appealed to the U.S. Court of Appeals for the Ninth Circuit.

On November 13, 2006, a panel of the Ninth Circuit issued a decision and affirmed the District Court. *See Gros Ventre Tribe, et al. v. United States, et al.*, 469 F.3d 801 (9th Cir. 2006) (App., *infra*, 1-27). The panel's decision recognized a direct conflict in Ninth Circuit case law

concerning whether § 702's waiver of sovereign immunity for nonmonetary actions against the government is limited by the "final agency action" provision of § 704. *Id.* at 809 (App., *infra*, 12-15) (citing *The Presbyterian Church (U.S.A.) v. U.S.*, 870 F.2d 518, 523-26 (9th Cir. 1989); *Gallo Cattle Co. v. U.S. Dep't of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998)). The panel declined to resolve the matter, however, indicating that the conflict could only be resolved by the entire Ninth Circuit through the *en banc* process. *Id.* (App., *infra*, 14). The Ninth Circuit panel then held that the Tribes have no common law cause of action for breach of trust under the facts of the case. *Id.*

The Tribes timely filed a petition for rehearing and rehearing *en banc* on December 28, 2006. On January 11, 2007, Judge Tallman, a member of the Ninth Circuit panel, ordered the defendants to respond, which they did on February 9, 2007. On March 16, 2007, the Ninth Circuit panel denied the petition for rehearing. (App., *infra*, 59)

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE SPLIT AS TO WHETHER THE APA'S WAIVER OF SOVEREIGN IMMUNITY IS LIMITED BY OTHER PROVISIONS OF THE APA, INCLUDING SECTIONS 704 AND 706, AND THE QUESTIONS SHOULD BE DECIDED BY THIS COURT.

Section 702 of the APA waives sovereign immunity for any person who has suffered "legal wrong" due to the acts or failure to act of an agency or officer or employee thereof, acting in an official capacity or under color of legal

authority when the relief sought does not include money damages. 5 U.S.C. § 702. "Legal wrong" means such wrong as particular statutes or the courts have recognized as constituting grounds for judicial relief. *Kansas City Power*, 225 F.2d at 932 ("'legal wrong' means such wrong as particular statutes and the courts have recognized as constituting grounds for judicial review").

Justice Souter has previously stated that "5 U.S.C. § 702 . . . waives the immunity of the United States in actions for relief other than money damages" and "is not restricted by the requirement of final agency action that applies to suits under the [APA]." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 510 n.4 (1999) (Souter, J., dissenting). There is confusion among the Circuits, however, as to whether § 702's waiver is restricted by the APA's other provisions – including the "final agency action" requirement of § 704 of the APA, and the standards of judicial review found in § 706 of the APA.[3]

The Third Circuit, for example, agrees with Justice Souter that § 702 is not limited by a "final agency action." *See, e.g., Johnsrud*, 620 at 31 (§ 702 waived sovereign immunity for nonstatutory review of claims seeking

[3] The requirement of "final agency action" is part of § 704 of the APA, and applies to judicial review cases. *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."). There is no common law "final agency action" requirement. Federal common law claims "arise under" the laws of the United States within the meaning of 28 U.S.C. § 1331. *See Illinois v. City of Milwaukee*, 406 U.S. at 100 ("section 1331 jurisdiction will support claims founded upon federal common law as well as those of statutory origin."); *Northwest Sea Farms*, 931 F.Supp. at 1519-20 (the trust obligation constitutes "law to apply" consistent with *Heckler v. Chaney*, 470 U.S. 821 (1985).

equitable relief for ongoing agency inaction allegedly required by U.S. Constitution); *Jaffee v. U.S.*, 592 F.2d 712, 718-19 (3d Cir. 1979) (§ 702 waived sovereign immunity for nonstatutory review of agency action in suit alleging, inter alia, ongoing agency failure to give medical warning and provide or subsidize medical care as required by U.S. Constitution).

At least two different Ninth Circuit panels, however, have issued decisions that are in conflict on this question, as the panel below recognized. *Compare Presbyterian Church,* 870 F.2d at 525 ("On its face, the 1976 amendment is an unqualified waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable."); *with Gallo Cattle*, 159 F.3d at 1198 (holding that the waiver "'contains several limitations,' including § 704's 'final agency action' requirement"). In another, Indian law case, however, a Ninth Circuit panel held that § 702's waiver "is not limited to suits" under the APA – *i.e.*, "the abolition applies to every 'action in a court of the United States seeking relief other than money damages . . . '" and "[n]o words of § 702 and no words of the legislative history provide any restriction to suits 'under' the APA." *Assiniboine & Sioux Tribes of the Ft. Peck Reservation v. Bd. of Oil & Gas Conservation of State of Montana*, 792 F.2d 782, 793 (9th Cir. 1986) (quoting C. Davis, *Administrative Law Treatise* §23:19, at 195 (2d ed. 1984)).[4]

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[4] As stated in the legislative history of the 1976 amendments:

> The application of sovereign immunity is illogical and one cannot predict in what case the injustice is likely to occur. . . . [T]he time [has] now come to eliminate the sovereign immunity defense *in all equitable actions* for specific

(Continued on following page)

There is also confusion within the D.C. Circuit on this question. For example, in several opinions, the D.C. Circuit has held that § 702's waiver of sovereign immunity applies to *any* suit challenging a legal wrong as a result of agency action, whether under the APA or not, and is limited only by its own terms – *i.e.*, when another statute expressly or implicitly forecloses equitable relief. *See*, *e.g.*, *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("The APA's waiver of sovereign immunity applies to any suit whether under the APA or not.") (citing *Clark v. Library of Congress*, 750 F.2d 89, 102 (D.C. Cir. 1984); *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 919 (1982) (§ 702's waiver limited only by its own terms, *i.e.*, does not affect courts' power to dismiss any action or deny relief on "any other appropriate legal or equitable ground"); *Schnapper*, 667 F.2d at 107-08 (§ 702 "retains the defense of sovereign immunity only when another statute expressly or implicitly forecloses injunctive relief"); *accord*, *Dronenburg v. Zech*, 741 F.2d 1388, 1389-91 & n.3 (D.C. Cir. 1984).

In *Cobell v. Norton*, however, the D.C. Circuit applied the "final agency action" requirement of § 704 in determining whether the district court had subject matter jurisdiction over claims alleging breach of trust obligations grounded in federal law. *Cobell v. Norton*, 240 F.3d 1081, 1094-95 (D.C. Cir. 2001). In *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 946-47 (D.C. Cir. 2004),

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relief against a Federal agency or officer acting in an official capacity.

H.R. Rep. No. 94-1656, at 8-9, *reprinted in* 1976 U.S.C.C.A.N. 6121, 6128-29 (emphasis added).

cert. denied, 545 U.S. 1104 (2005), the D.C. Circuit observed that for non-statutory causes of action, the APA's waiver of sovereign immunity is limited by the "adequate remedy" bar of § 704. In a 2006 decision, however, the D.C. Circuit reiterated its holding in *Chamber of Commerce v. Reich*, *Sea-Land Service*, and *Dronenburg*, and held that § 702's waiver is "not limited to APA cases – and hence that it applies regardless of whether the elements of an APA cause of action are satisfied." *See Trudeau v. Federal Trade Com'n*, 456 F.3d 178, 186-87 (D.C. Cir. 2006).

The question of whether § 702's waiver of sovereign immunity is limited by § 704 or § 706 of the APA affects all cases in which a party seeks equitable relief involving common law claims against the federal government. Unless that question is resolved by this Court, the confusion reflected in the Ninth Circuit's opinion in this case will recur in every case where a party seeks to enforce non-statutory rights in equity against the federal government, whether those rights arise under treaties, the Constitution, or the common law.[5]

[5] In this case, the Tribes challenged actions by the federal government that have harmed and are continuing to harm the Tribes, their members, and their protected water resources. The Tribes sought declaratory relief to clarify the legal obligations of federal agencies to the Tribes, and injunctive relief to stop pollution of Tribal waters and restore historic flows onto Tribal lands.

II. THE CIRCUITS ARE SPLIT AS TO WHETHER THE EQUITABLE POWERS OF FEDERAL COURTS ARE LIMITED IN INDIAN TRUST CASES BY THE COURT'S OPINIONS INVOLVING CLAIMS FOR MONEY DAMAGES BY INDIAN TRIBES UNDER THE INDIAN TUCKER ACT.

The lower courts' decisions erroneously conflated this Court's opinions involving Tribal claims for money damages under the Indian Tucker Act with this Court's opinions discussing the Indian trust doctrine as it applies to Tribal claims for equitable relief arising from Treaty violations. This conflation put the panel's opinion in conflict with opinions from other Circuits, and from this Court, and led the panel to two flawed conclusions: (1) in the absence of a specific duty, or specific control over tribal property, the government fulfills its obligations as a trustee for the Tribes if it complies with generally applicable statutes, *see Gros Ventre*, 469 F.3d at 812 (App., *infra*, 20); and (2) the United States' fiduciary trust obligations to protect the Tribes from depredations applies only to acts that occur on the Reservation itself, and not to acts that occur off-Reservation, but which have impacts on the Reservation. *Id.* at 811-12 (App., *infra*, 20-23).

A. This Court's Indian Tucker Act Opinions Have Not Changed This Court's Indian Trust Law Opinions.

The Ninth Circuit panel held that the Tribes' treaties and agreements promising to "protect" the Tribes from "depredations and other unlawful acts," and subsequent agreements promising to reserve the full use of waters, undiminished in quantity and undeteriorated in quality,

flowing onto the Reservation, do not expressly promise to manage off-Reservation resources for the benefit of the Tribes. *See* 469 F.3d at 811-12 (App., *infra*, 18-23). This extremely narrow (and even illogical) reading of the phrase "protect . . . from depredations and other unlawful acts" directly conflicts with two long-standing canons of construction developed by this Court as part of its Indian trust law jurisprudence.

First, treaties are to be liberally interpreted to accomplish their protective purposes, with ambiguities to be resolved in favor of the Indians. *Carpenter v. Shaw*, 280 U.S. 363, 366-67 (1930); *Winters*, 207 U.S. at 576-77. Second, Indian treaties must be construed as the Tribes would have understood them. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) ("we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them") (other citations omitted).

The panel stated that "the Tribes seek to impose a duty, not found in any treaty or statute, to manage non-tribal property for the benefit of the tribes." 469 F.3d at 811 (App., *infra*, 18) (citing *U.S. v. Mitchell*, 445 U.S. 535, 538 (1980) ("*Mitchell I*")). *See id.* (App., *infra*, 18-19). The panel did not address the fact that the off-Reservation conduct was directly harming water quantity and quality on the Reservation, and most certainly did *not* interpret the Tribes' treaties and agreements (including the Blackfeet Treaty) "as the Indians themselves . . . understood them." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196; *see also*, *e.g.*, S. Doc. No. 54-117, at 9 (App., *infra*, 118-19) (recounting "Medicine Bear" – *i.e.*, "I am not willing to sell the . . . water . . . but I am willing to

sell that mine"); *supra* at 7-8 (recounting promises made to Tribes regarding water rights); *Winters*, 207 at 576 (Tribes have property right to water originating in the Little Rocky Mountains).

Rather than citing any of these well-developed canons of construction for interpreting Treaties consistent with the Indian trust doctrine, the Ninth Circuit cited *Mitchell I*, 445 U.S. 535, a case involving claims for *monetary* relief under the Indian Tucker Act. 28 U.S.C. § 1505. Indian Tucker Act cases, however, are heard by the Federal Court of Claims, and, under this Court's decisions, require a substantive source of law that establishes a specific fiduciary duty that can be fairly interpreted as mandating compensation for damages sustained as a result of a breach of the duty imposed. *See White Mountain Apache Tribe*, 537 U.S. at 479 (money damages can "mak[e] the Tribe whole for deterioration already suffered, and shield the Government against the remedy whose very availability would deter it from wasting trust property in the period before a Tribe has gone to court for injunctive relief"); *Navajo Nation*, 537 U.S. at 503 (having brought suit in the Court of Claims pursuant to the Indian Tucker Act, which waives sovereign immunity, "tribal plaintiff must [then] invoke a rights-creating source of substantive law that 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained'"); *see also U.S. v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*"). This jurisprudence sets a high bar for recovery of money damages from the federal government.

In this case, however, the Tribes made no claim for money damages.[6]

In addition to misapplying this Court's Indian Tucker Act jurisprudence to equitable claims seeking enforcement of treaty rights, the Ninth Circuit's opinion conflicts with decisions from other Circuits. The Eighth Circuit has determined, for example, that the federal government has a trust obligation that must be exercised concurrently with – but not necessarily dependent upon – the existence of other statutes. *See Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989). The First Circuit has concluded (as has this Court) that even absent a specific statute establishing a management duty, *Mitchell II* directs courts to find a trust obligation whenever the federal government has assumed control over Tribal land or resources. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

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[6] The Indian Tucker Act gives the United States Court of Claims jurisdiction over "any [damages] claim against the United States founded either upon the Constitution, or any Act of Congress." *Id.* Jurisdiction under the Indian Tucker Act is thus expressly limited to specific textual sources – acts of Congress or the Constitution. The *Mitchell I* court held that the General Allotment Act, relied upon by the Tribe as its source of textual, substantive law, did not in fact support a claim for money damages and did not therefore meet the requirements of the Indian Tucker Act for jurisdiction in the U.S. Court of Claims. *Mitchell I*, 445 U.S. at 546.

B. The Ninth Circuit Erroneously Interpreted The Treaties Between The Federal Government And The Tribes.

Promises made to the Tribes in treaties and Congressionally-ratified agreements to protect Tribal waters have unquestionably been broken by the federal government in this case. Two decades of virtually unrestricted cyanide heap-leach mining has destroyed the mountains adjacent to the Reservation that contain the headwaters for critical Reservation streams. Both the quantity and the quality of water on the Reservation has been damaged. The Senate Report for the Grinnell Agreement reflects multiple promises made to the Tribes concerning the water originating in the mountains in exchange for gold (which is now almost completely gone).[7] The Tribes have a classic

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[7] *See* S. Doc. No. 54-117, at 3 (App., *infra*, 104) (stating that there should be "careful consideration in order that no irreparable damage might be done the Indians by depriving" them of water, "which might be vital to their very existence"); *id.* (federal agency to hold "control of the waters of the streams having their sources in the mountains" for the benefit of the Indians' domestic uses); *id.* (promising to "protect the Indians in the continued enjoyment of the natural resources of their reservation"); *id.* at 3-4 (App., *infra*, 105) (assuring Tribes "that they would have ample water for all their needs"); *id.* at 4 (App., *infra*, 105) (stating that the "water rights of the Indians will not in any way be impaired by the cession, and that they have retained . . . water for their uses for all time"). The Senate Report reflects, verbatim, the very specific understanding that the Indians of Fort Belknap had of the Grinnell Agreement:

> Medicine Bear: I am not willing to sell the forest, nor the water nor any of the things that you mention – that is the grass, wood and other things – but I am willing to sell that mine.
>
> Eyes in the Water: I am not willing to give you the wood, not the grass, nor the water, but only those rocks lying around the mines, and don't shut off the

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claim for treaty violations and non-monetary relief. These claims arise under the branch of Indian trust law jurisprudence by which trust obligations contained in specific treaties and statutes may be relied upon to bring an equitable claim in federal district court for breach of those obligations. *See, e.g., Mitchell II*, 463 U.S. at 227 (recognizing that "violations of duties imposed by the various statutes may be cured by actions for declaratory, injunctive or mandamus relief against the Secretary" and that sovereign immunity is waived for such actions by § 702 of the APA); *see also, e.g., Northwest Sea Farms*, 931 F. Supp. at 1520 ("It is this fiduciary duty, rather than any express regulatory provision, which mandates that the Corps take treaty rights into consideration."); *Cobell*, 240 F.3d at 1101 (seeking an accounting of funds managed by the federal government as trustee on behalf of individual Indians); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973) (holding that the Secretary of the Interior must direct all water possible to the Pyramid Lake Paiute Tribe, in fulfillment of his trust obligation and the Tribe's water rights); *Muckleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1512 (W.D. Wash. 1988) (holding that treaty-given fishing right was property right that could not be taken without Act of Congress); *cf. U.S. v. Winans*, 198 U.S. 371 (1905) (action to enjoin obstruction of fishing rights in the Columbia River secured to the Yakima

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water. If you don't touch those things, the people might live a little while yet.

Bad Dog: You ask for the mine and I am willing to give it, but I don't want you to touch any of the rocks or grass or water; that is what I will depend upon.

Id. at 9 (App., *infra*, 118-19).

Indians by the treaty of 1859); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (equitable action against state agencies to enforce hunting, fishing, and gathering rights under 1837 Treaty).

C. The Ninth Circuit's Opinion Robs This Court's Indian Trust Jurisprudence Of All Meaning.

In addition to violations of specific treaty obligations, the Tribes alleged that the federal government violated the government's *general* trust obligation to the Tribes. This Court has reaffirmed the "undisputed existence of a general trust relationship between the United States and the Indian people. . . . " *Navajo Nation*, 537 U.S. at 506. The general trust obligation imposes duties on the federal government even in the absence of a specific treaty, agreement, executive order, or statute. *See, e.g., Cramer v. U.S.*, 261 U.S. 219 (1923); *U.S. v. Creek Nation,* 295 U.S. 103 (1935).[8] The trust obligation imposes a fiduciary duty

[8] The law regarding the federal government's general trust obligation is established in a long line of cases going back to 1831. *See, e.g., Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) ("[Indians'] relation to the United States resembles that of a ward to his guardian."); *Mitchell I,* 445 U.S. 535; *Seminole Nation v. U.S.*, 316 U.S. 286, 296 (1942) ("recogniz[ing] the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people"); *U.S. v. Mason*, 412 U.S. 391, 398 (1973) ("There is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and that, as such, it is duty bound to exercise great care in administering its trust."); *Minnesota v. U.S.*, 305 U.S. 382, 386 (1939) (observing that "the owner of the fee of the Indian allotted lands and holds the same in trust for the allottees"); *U.S. v. Candelaria*, 271 U.S. 432, 442 (1926) (recognizing that "Congress, in imposing a restriction on the alienation of [Indian territory] lands, as we think it did, was but continuing a policy which prior governments

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on all federal government agencies whose actions adversely affect Indian tribes. *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981), *cert. denied*, 454 U.S. 1081 (1981).[9]

Both the District Court and the Ninth Circuit panel in this case found that the general trust obligation may be satisfied simply by facial compliance with statutory and regulatory requirements. This rule, which empties the trust obligation of all meaning and treats Tribes no differently than other parties, originated with *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980). In *North Slope*, the Ninth Circuit mistakenly applied the requirements for waiver of sovereign immunity under the *Indian Tucker Act* to a case arising under *§ 702's* waiver of immunity. The *North Slope* panel cited to this Court's holding in

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had deemed essential to the protection of such Indians" – *i.e.*, that of an " 'extended a special guardianship' ") (internal citation omitted); *accord*, *McKay v. Kalyton*, 204 U.S. 458, 469 (1907); *Minnesota v. Hitchcock*, 185 U.S. 373, 396 (1902); *U.S. v. Kagama*, 118 U.S. 375, 382-84 (1886); *see also Island Mountain Protectors*, 144 IBLA at 185 ("In addition to a mandate found in a specific provision of a treaty, agreement, executive order, or statute, any action by the Government is subject to a general trust responsibility."); *id.* ("BLM had a trust responsibility to consider and protect Tribal resources").

[9] Although *Mitchell II* involved a claim for money damages, this Court reaffirmed that the federal government has a trust obligation to Tribes independent of any statutory expression of a trust. The Court found that a fiduciary relationship arises whenever the executive branch maintains extensive control over Indian property. *Mitchell II*, 463 U.S. at 222-25; *see also id.* at 225 ("a fiduciary relationship necessarily arises when the Government assumes such elaborate control over . . . property belonging to Indians"). Thus, where the federal government "takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties . . . even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." *Id.* at 225.

Mitchell I that, for *Indian Tucker Act* money claims, unless there is "an unambiguous provision by Congress that clearly outlines a federal trust responsibility," the general trust obligation is met through compliance with general statutes and regulations. *Id.*[10]

Since 1980, the Ninth Circuit has followed the *North Slope* opinion without distinguishing between Indian Tucker Act claims for money damages and § 702 claims for non-monetary damages. *See, e.g., Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 574 (9th Cir. 1998); *Havasupai Tribe v. U.S.*, 752 F. Supp. 1471, 1486-87 (D. Ariz. 1990), *aff'd sub nom., Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991), *cert. denied*, 503 U.S. 959 (1992); *Inter-Tribal Council of Arizona v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995); *Pit River Tribe v. Bureau of Land Mgmt.*, 469 F.3d 768 (9th Cir. 2006).

The failure to distinguish between money damages and equitable relief in cases involving Indian trust claims has, unfortunately, led to the illogical result that the government's general trust obligation to Indian tribes has no content or meaning, and this Court's opinions recognizing and describing that trust are mere words on paper. "If the Court finds a prevailing fiduciary obligation only when statutory law already imposes duties on the executive branch, then the doctrine arguably amounts to little more

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[10] In *North Slope*, the Inupiat Tribe of Alaska sued the Department of the Interior for endangering the survival of the bowhead whale, upon which the Inupiat depend, through oil leasing in the Beaufort Sea. The Inupiat sought injunctive relief – the cessation of oil leasing – to remedy the Department's violations of its general trust responsibility. *Id.* at 597. The *North Slope Borough* court, relying on *Mitchell I*, ruled against the Inupiat, and held that a trust responsibility can only arise from a statute, treaty or executive order. *Id.* at 611 (citing *Mitchell I*, 445 U.S. at 535).

than an emboldened principle of statutory interpretation." *See* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1521-22 (1994).

CONCLUSION

The Court should grant this petition in order to resolve conflicts among the Circuits on two issues: (1) whether the waiver of sovereign immunity in § 702 of the APA is limited by §§ 704 and 706 of the APA; and (2) whether this Court's Indian Tucker Act opinions involving Tribal claims for money damages have altered the Court's opinions involving interpretations of treaties and the general Indian trust doctrine. There is widespread, long-standing confusion within the Ninth Circuit, and between the Ninth and other Circuits, concerning the scope of § 702 of the APA, and whether federal courts' equitable powers are limited in all Indian trust cases by this Court's opinions involving claims for money damages by Indian Tribes – *i.e.*, the *Mitchell* line of cases. These questions should finally be resolved by this Court.

Respectfully submitted,

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JUNE 2007

469 F.3d 801

United States Court of Appeals, Ninth Circuit.
GROS VENTRE TRIBE; Assiniboine Tribe;
The Fort Belknap Indian Community Council of the
Fort Belknap Indian Reservation, Plaintiffs-Appellants,
v.
UNITED STATES of America; United States Bureau of
Land Management, an agency of the U.S. Dept' of Interior;
Bureau of Indian Affairs, an agency of the U.S. Dept'
of Interior; and Indian Health Service, an agency of
the U.S. Dept' of Health and Human Services,
Defendants-Appellees.
No. 04-36167.

Argued and Submitted June 6, 2006.
Filed Nov. 13, 2006.

Michael D. Axline, Western Environmental Law Center, Sacramento, CA, for the plaintiffs-appellants.

John E. Arbab, Trial Attorney, Department of Justice, Environment and Natural Resources Division, Washington, D.C., for the defendants-appellees.

Appeal from the United States District Court for the District of Montana; Donald W. Molloy, Chief District Judge, Presiding. D.C. No. CV-00-00069-DWM.

Before: TALLMAN and BYBEE, Circuit Judges, and HUFF,* District Judge.

TALLMAN, Circuit Judge:

Appellants Gros Ventre Tribe, Assiniboine Tribe, and the Fort Belknap Indian Community Council (collectively

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* The Honorable Marilyn L. Huff, United States District Judge for the Southern District of California, sitting by designation.

"the Tribes") appeal the district court's order granting summary judgment for the United States. The Tribes filed suit in the District of Montana against the United States, its Bureau of Land Management ("BLM"), the Bureau of Indian Affairs, and the Indian Health Service (collectively "the government"), alleging that the government had violated specific and general trust obligations to protect tribal trust resources (primarily water rights) by authorizing and planning to expand two cyanide heap-leach gold mines located upriver from the Tribes' reservation. We affirm.

The Tribes urge a theory of liability conflating general trust law principles with an attack on agency inaction under the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 706(1). But none of the treaties cited by the Tribes impose a specific duty on the United States to regulate third parties or non-tribal resources for the benefit of the Tribes. Because the government's general trust obligations must be analyzed within the confines of generally applicable statutes and regulations, we reject the suggestion to create by judicial fiat a right of action Congress has not recognized by treaty or statute. Therefore, because the Tribes do not have a cognizable non-APA claim, we agree with the district court that the Tribes are required to comply with the APA's "final agency action" requirement. *See id.* § 704. We also hold that after bifurcating the trial into a liability and remedy phase, the district court did not abuse its discretion by granting the government's motion for summary judgment upon conclusion of the liability phase.

I

A

The Gros Ventre and Assiniboine Tribes reside on the Fort Belknap Indian Reservation ("Reservation") located in north-central Montana. Pertinent to this appeal is the fact that in 1851 seven different Indian nations, including the two Tribes, signed the Treaty of Fort Laramie. The Indian nations had "assembled for the purpose of establishing and confirming peaceful relations amongst themselves," and, by signing the treaty, they "agree[d] to abstain in future from all hostilities whatever against each other, to maintain good faith and friendship in all their mutual intercourse, and to make an effective and lasting peace." Treaty of Fort Laramie art. 1, Sept. 17, 1851, 11 Stat. 749. The Tribes also formally recognized "the right of the United States Government to establish roads, military and other posts, within their respective territories." *Id.* at art. 2. In return, the United States agreed to "protect the . . . Indian nations against the commission of all depredations by the people of the said United States." *Id.* at art. 3. The Treaty of Fort Laramie did not convey any land to the Indians "but instead chiefly represented a covenant among several tribes which recognized specific boundaries for their respective territories." *Montana v. United States,* 450 U.S. 544, 553, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).

The United States made a similar promise to protect the Tribes and their territory in the 1856 Treaty with the Blackfeet. The Tribes "agree[d] that citizens of the United States may live in and pass unmolested through the countries respectively occupied and claimed by them." Treaty with the Blackfeet art. 7, Oct. 17, 1855, 11 Stat. 657. The United States agreed to be "bound to protect said Indians against depredations and other unlawful acts

which white men residing in or passing through their country may commit." *Id.*

In 1888, Congress ratified an agreement to reduce the territory of the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indian Tribes. *See* An Act to Ratify and Confirm an Agreement with the Gros Ventre, ch. 213, May 1, 1888, 25 Stat. 113. In return, Congress created the original Fort Belknap Indian Reservation, an area of land specifically set aside for the use and enjoyment of the Indian tribes. Although a reduction of their former territory, the original Fort Belknap Indian Reservation included the Little Rocky Mountains of Montana, a location long used by the Tribes for subsistence, social, and religious purposes.

In the early 1880s, prior to the formation of the original Fort Belknap Indian Reservation, gold was discovered on the southern slopes of the Little Rocky Mountains. Congress soon realized that the larger part of the mineral-bearing country was located within the boundaries of the newly delineated Fort Belknap Indian Reservation. In 1896, Congress ratified what later became known as the "Grinnell Agreement," wherein the Tribes agreed to relinquish all right, title, and interest to the mineral-bearing portion of the Little Rocky Mountains in return for certain monetary considerations. Agreement with the Indians of the Fort Belknap Indian Reservation in Montana, ch. 398, 29 Stat. 350 (1895). While not articulated in the agreement ratified by Congress, it was reported to the Senate that the commission authorized to negotiate with the Fort Belknap Indian tribes had assured the tribes that they "would not be giving up any of their timber or grasslands . . . and that they would have ample water for all their needs." S. Doc. No. 54-117, at 3-4 (1896).

Within the next ten years, the Little Rocky Mountains mining district became Montana's largest gold producer.

The advent of cyanide heap-leach technology,[1] in conjunction with a sharp rise in gold prices, prompted the development of open pit mining operations beginning in the late 1970s. In 1979, the Montana Department of State Lands issued permits to Zortman Mining, Inc. ("ZMI"), a wholly owned subsidiary of Pegasus Gold, Inc. ("Pegasus"), authorizing the Zortman and Landusky cyanide heap-leach mines. Both mines are located near the southern boundary of the Reservation. The BLM did not establish federal regulations controlling the operation of mines on public lands until 1981. At that time, the BLM approved the Zortman and Landusky mines as pre-existing authorizations under its newly promulgated regulations. The BLM issued a Plan of Operation for each mine, and both plans were amended numerous times between 1979 and 1991.

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[1] Cyanide heap leaching is a process used to recover microscopic gold particles typically found in low-grade ore deposits. The process includes drilling, blasting and crushing low-grade ore. The ore is then transferred to a leach pad, a carefully constructed series of flat-topped heaps that is lined with plastic and/or clay to try and prevent the loss of solution. The leach pad is also constructed in lifts, which are sequentially sprayed with a cyanide solution. Once processed, a "pregnant solution" containing the gold particles is collected, processed in tanks or treatment cells, and heated in a furnace to form impure gold/silver ore bars for further refinement. U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT. & MONT. DEP'T OF ENVTL QUALITY, FINAL ENVTL. IMPACT STATEMENT, ZORTMAN AND LANDUSKY MINES, RECLAMATION PLAN MODIFICATIONS AND MINE LIFE EXTENSIONS 1-10 (1996) [hereinafter 1996 FEIS].

In 1992, ZMI proposed to expand the Zortman mine. In the course of reviewing the proposed Zortman expansion, the BLM and the Montana Department of State Lands determined that acid rock drainage ("ARD")[2] had become a widespread problem at both the Zortman and Landusky mines. Despite these findings, in 1996, the BLM and the Montana Department of Environmental Quality[3] issued an Environmental Impact Statement ("EIS") and Record of Decision ("ROD") approving a proposed expansion of mining operations at both locations. In late 1996, the Tribes appealed that decision to the Interior Board of Land Appeals ("IBLA"). In 1998, before the IBLA issued a decision on the merits, Pegasus and ZMI filed for bankruptcy. Consequently, the companies abandoned their plans to expand and announced that they would reclaim and close the mines. Ultimately, the IBLA found that the 1996 ROD did not comply with the National Environmental Policy Act ("NEPA"), the Federal Land Policy and Management Act ("FLPMA"), or the government's trust obligations to the Tribes. *See Island Mountain Protectors,* 144 IBLA 168 (May 29, 1998).

On June 1, 1998, the BLM issued a second ROD requiring reclamation of existing disturbances using agency-developed mitigation tactics. In doing so, it rescinded the 1996 ROD authorizing mine expansion.

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[2] ARD occurs when rock containing sulfides is exposed to air and water during mining operations. The water becomes acidic, sometimes containing metals such as lead, arsenic, zinc, copper, and silver. Bacteria present in mine water can accelerate the rate of acid generation because of their ability to oxidize sulfide-bearing materials. 1996 FEIS, 1-9.

[3] The Montana Department of Environmental Quality is the successor agency to the Montana Department of State Lands.

Because the BLM relied on the 1996 EIS in preparing the 1998 ROD, the IBLA denied the BLM's motion for reconsideration and vacated the 1998 ROD on the same grounds it had cited to vacate the earlier decisions. In response to the IBLA's decision, the BLM and the State of Montana engaged in consultation with the Tribes. The agency issued a Final Supplemental Environmental Impact Statement ("SEIS") in 2001 and signed a new ROD in May 2002.

B

In April 2000, the Tribes filed suit claiming that the government breached its trust responsibility to the Tribes by approving, permitting, and failing to reclaim the Zortman and Landusky mines, the operation of which had diminished and continues to diminish the quality and quantity of water resources available to the Tribes. The Tribes further alleged that the government failed to consult with the Tribes, and consider their spiritual, cultural, and religious interests in the Little Rocky Mountains. According to the Tribes, the government breached its common law trust obligations by failing to take action that it was legally required to take, or by acting in a fashion that was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 5 U.S.C. § 706. The Tribes filed an equitable action, asking the district court to (1) declare that the government violated its fiduciary duty to protect tribal trust resources, (2) find that the government's failure to comply with the NEPA and other statutory mandates constituted an unnecessary and undue degradation in violation of the FLPMA, (3) issue a writ of mandamus compelling the government to comply with its trust responsibilities, and

(4) enjoin the government from further destruction of tribal trust resources.

On January 29, 2001, the district court denied the government's motion to dismiss for lack of subject matter jurisdiction or failure to state a claim. The government had argued that the Tribes' claims were subject to all of the requirements of the APA. Consequently, the government asserted that the district court lacked jurisdiction to consider any claim that did not involve a "final agency action" and that the "final agency actions" that had occurred prior to 1994 were barred by the six-year statute of limitation.

The Tribes countered by arguing that the APA's waiver of sovereign immunity applies to non-APA claims, as well as APA claims. They contended that their common law trust claim could be raised independent of the APA and other statutes and, therefore, they were not limited to challenging only final agency actions.

The district court initially agreed with the Tribes and denied the government's motion to dismiss. Reading the complaint in the light most favorable to the Tribes, the district court found that the Tribes' common law claims were more like private nuisance claims – rather than an action stemming directly from administrative proceedings – and it agreed that "the trust relationship between the Tribes and the federal government provide[d an] independent basis to proceed." Therefore, because the district court concluded that the APA's waiver of sovereign immunity applied to non-APA claims, as well as APA claims, the Tribes were not constrained by the final agency action requirement.

On November 30, 2001, the district court issued an order bifurcating the trial into a liability phase and a remedy phase. In December 2002, the parties filed cross-motions for summary judgment, and upon the district court's order they renewed those motions in 2003.

On June 28, 2004, the district court granted the government's motion for summary judgment. Recognizing that "[t]he Tribes are not challenging the 2002 [sic] SEIS and ROD," the district court determined that the Tribes failed to challenge any "final agency action" as required by the APA.[4] Moreover, it reasoned that "although damages have been bifurcated from liability, the lack of an effective remedy for any wrongs committed on the Tribes render[ed] the exercise of judicial power superfluous, and the case moot." The BLM withdrew the plan to expand the mines, and, therefore "the actions of which the Tribes complain either cannot be undone or have already been undone." Consequently, "the [district court] siting in equity ha[d] little to offer the Tribes until and unless they seek judicial review of the 2002[sic] SEIS and ROD."

Subsequently, the Tribes filed a Motion to Amend Judgment. On October 22, 2004, the district court denied the Tribes' motion in a published order but clarified its reasoning. *See Gros Ventre Tribe v. United States,* 344 F.Supp.2d 1221 (D.Mont.2004). The district court stated that it had reconsidered its prior order denying the government's motion to dismiss sua sponte. *Id.* at 1223. It now believed that the Tribes' claims were subject to all APA provisions, including the "final agency action"

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[4] While this appeal was pending, the IBLA dismissed the Tribes' challenge to the 2001 SEIS and 2002 ROD as moot.

requirement.[5] *Id.* at 1226. Moreover, as an alternative holding, the district court concluded that the Tribes' common law claims must fail because the Tribes could not state a cognizable claim that the government had failed to satisfy any other statutory obligations, whether directed at protecting the Tribes or the environment in general. As the district court stated, "In the absence of a specific duty, or specific control over tribal property, the government fulfills its obligations as a trustee for the Tribes if it complies with applicable statutes." *Id.* "[T]he trust obligation is not elevated to an independent source of law," and, because it determined that the Tribes' failure to act claims under FLPMA were not reviewable, the district court concluded that the Tribes' common law rights were not independently enforceable under the APA. *Id.* at 1227.

Consequently, because the statute of limitation for any civil claim against the government is six years, the Tribes' claims were limited to final agency actions taken after April 12, 1994.[6] *Id.* at 1229. Although the 1996 ROD was a "final agency action" and occurred within the six-year statute of limitation, that ROD was later superseded by

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[5] Specifically, the district court stated the following:

> [B]ecause the APA waives the government's sovereign immunity, the APA establishes the necessary prerequisites to the court's jurisdiction. "[T]he terms of [the government's] consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood,* 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941).
>
> Judicial review under § 702 is expressly conditioned, under § 704, on the existence of a 'final' agency action.

Gros Ventre Tribe, 344 F.Supp.2d at 1226 (second and third alterations in original).

[6] The government raised the statute of limitation defense in its original motion to dismiss.

another "final agency action," which the Tribes did not challenge. *Id.* Therefore, the district court concluded that because the Tribes "[l]ack[ed] an injury flowing from the 1996 decision, [they did] not have standing to challenge the 1996 decision." *Id.* The district court went on to hold that the controversy over the BLM's approval of the entire mine operation is now moot because the mines have closed, and there is no indication that they will reopen. *Id.* at 1230. The Tribes timely appealed.

II

A district court's decision to grant summary judgment is reviewed de novo. *Buono v. Norton,* 371 F.3d 543, 545 (9th Cir.2004). Its decision regarding the management of litigation is reviewed for an abuse of discretion. *Muckleshoot Tribe v. Lummi Indian Tribe,* 141 F.3d 1355, 1358 (9th Cir.1998).

III

A

The parties go to great pains to argue the issue whether the APA's waiver of sovereign immunity under 5 U.S.C. § 702 for non-monetary actions against the government is conditioned upon the parties challenging a "final agency action" as set forth in 5 U.S.C. § 704. We now recognize that there is a conflict in our caselaw regarding this issue; however, we need not resolve it as we affirm the district court on its alternative holding.[7]

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[7] Although we refer to this as an "alternative holding" we do not agree with the parties that this was dicta by the district court. The

(Continued on following page)

The government argues that this case is controlled by the Ninth Circuit's decision in *Gallo Cattle Co. v. U.S. Department of Agriculture,* 159 F.3d 1194 (9th Cir.1998). There, we specifically stated that "the APA's waiver of sovereign immunity contains several limitations," including § 704's "final agency action" requirement. *Id.* at 1198. Because the appellants in *Gallo Cattle* failed to challenge a "final agency action," the express waiver of sovereign immunity did not apply, and 28 U.S.C. § 1331 could not vest the district court with jurisdiction. *Id.* at 1199.

The Tribes attempt to distinguish *Gallo Cattle* on the ground that it involved a request for judicial review of agency action and not common law claims seeking equitable relief for agency violations of common law duties. They argue that § 702 waives sovereign immunity in non-statutory review actions for non-monetary relief brought under 28 U.S.C. § 1331. *See Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. Bd. of Oil & Gas Conservation,* 792 F.2d 782, 793 (9th Cir.1986) ("This Court has held that section 702 does waive sovereign immunity in non-statutory review actions for non-monetary relief brought under 28 U.S.C. § 1331."). Therefore, they

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court was troubled by whether the Tribes – independent of any applicable statute – had a substantive right to enforce. *See Gros Ventre Tribe,* 344 F.Supp.2d at 1227 ("Nowhere do I find judicial support for the notion that the trust obligation can be enforced independently of some other source of law."); *id.* ("Even if the Court assumes the truth of Plaintiffs' allegation that those non-reservation activities have affected tribal property, the trust obligation is not elevated to an independent source of law."). Because the trust obligation cannot be independently enforced, the Tribes need to rely on statutes as the source of their substantive rights. In this case, their statutorily based claims can only be brought under the APA, as the statutes contain no private right of action. *See infra* § III.C.

contend that § 702's waiver applies to more than "just judicial review cases under the APA" and that there is "no common law 'final agency action' requirement."[8]

The Tribes' position is supported by *The Presbyterian Church (U.S.A.) v. United States,* 870 F.2d 518 (9th Cir.1989), where we rejected the Immigration & Naturalization Service's ("INS") argument that § 702's waiver of sovereign immunity is limited to only "agency actions" as defined by the APA. *Id.* at 526. In *The Presbyterian Church,* "[t]he INS'[s] argument [wa]s premised on the first sentence of § 702, enacted in 1946, which reads: 'A person suffering legal wrong because of any *agency action,* or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.'" *Id.* at 524-25 (quoting 5 U.S.C. § 702). Therefore, because it believed that the challenged actions in *The Presbyterian Church* were not "agency

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[8] The out-of-circuit cases cited by the Tribes do not lend support to their argument that the "APA provisions have no relevance to non-statutory common law claims." In *Chamber of Commerce v. Reich,* 74 F.3d 1322 (D.C.Cir.1996), although the appellants argued that § 702 applied to their non-APA cause of action, the court never reached that issue. Instead, citing the ultra vires doctrine set out by the Supreme Court in *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949), the D.C. Circuit held that "there [wa]s no sovereign immunity to waive [because] it never attached in the first place." *Reich,* 74 F.3d at 1329. The court reached a similar holding in *Clark v. Library of Congress,* 750 F.2d 89, 102 (D.C.Cir.1984) (determining that § 702 did not apply because the Library of Congress is not an "agency" as defined by the APA but nonetheless concluding that sovereign immunity did not bar the suit because "the challenged actions of the officials [we]re alleged to be unconstitutional or beyond statutory authority"). *But see Cobell v. Babbitt,* 30 F.Supp.2d 24, 33-35 (D.D.C.1998) (rejecting the argument that the plaintiffs must state a "final agency action" as defined by § 704 in order for the waiver of sovereign immunity under § 702 to apply).

actions,"[9] the INS argued that § 702's waiver of sovereign immunity did not apply. *Id.* at 525.

We see no way to distinguish *The Presbyterian Church* from *Gallo Cattle.* Under *The Presbyterian Church*, § 702's waiver is not conditioned on the APA's "agency action" requirement. Therefore, it follows that § 702's waiver cannot then be conditioned on the APA's "final agency action" requirement. *See Reno v. Am.-Arab Anti-Discrimination Comm.,* 525 U.S. 471, 510 n. 4, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999) (Souter, J., dissenting) ("[The waiver of sovereign immunity found in 5 U.S.C. § 702] is not restricted by the requirement of final agency action that applies to suits under the [APA]." (citing *The Presbyterian Church,* 870 F.2d at 523-26)). But that is directly contrary to the holding in *Gallo Cattle* where we stated that "the APA's waiver of sovereign immunity contains several limitations," including § 704's final agency action requirement. 159 F.3d at 1198.

Nevertheless, we need not make a sua sponte en banc call to resolve this conflict because, as we discuss below, the Tribes do not have a common law cause of action for breach of trust. *Cf. United States v. Torres-Hernandez,* 447 F.3d 699, 704 (9th Cir.2006) (declining to make a sua sponte en banc call to address an intra-circuit conflict when the court could affirm under either standard). Therefore, because the statutes that the Tribes cite authorize no private right

[9] Because it concluded that § 702's waiver of sovereign immunity is not conditioned on challenging an "agency action," the court never reached the issue of whether the challenged actions were "agency actions" within the meaning of 5 U.S.C. § 551(13). *The Presbyterian Church,* 870 F.2d at 525 n. 8.

of action, the Tribes must state their claims within the confines of the APA.

B

The Tribes argue that the APA's "final agency action" requirement is inapplicable because they have presented the court with simple common law trust claims based upon clearly identified and ongoing injuries. Even if the Tribes were correct about whether the "final agency action" requirement applies to non-APA claims relying on § 702's waiver of sovereign immunity, the Tribes cannot allege a common law cause of action for breach of trust that is wholly separate from any statutorily granted right. *See Cobell v. Babbitt,* 91 F.Supp.2d 1, 28 (D.D.C.1999) ("[The tribes] cannot state common-law claims for breach of trust against these federal officials in the context of financial mismanagement of the [Individual Indian Money] trust. 'There is no such thing as a common law judicial review in the federal courts.'" (quoting *Stark v. Wickard,* 321 U.S. 288, 312, 64 S.Ct. 559, 88 L.Ed. 733 (1994) (Frankfurter, J., dissenting))).

We recognize that there is a "distinctive obligation of trust incumbent upon the Government in its dealings with [Indian tribes]." *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206, 225, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (quoting *Seminole Nation v. United States,* 316 U.S. 286, 296, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942)). That alone, however, does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations. *Shoshone-Bannock Tribes v. Reno,* 56 F.3d 1476, 1482 (D.C.Cir.1995) ("[A]n Indian tribe cannot force the government to take a specific action

unless a treaty, statute or agreement imposes, expressly or by implication, that duty."); *Vigil v. Andrus,* 667 F.2d 931, 934 (10th Cir.1982) ("[T]he federal government generally is not obligated to provide particular services or benefits in the absence of a specific provision in a treaty, agreement, executive order, or statute."); *Miccosukee Tribe of Indians of Fla. v. United States,* 980 F.Supp. 448, 461 (S.D.Fla.1997) ("[T]he government assumes no specific duties to Indian tribes beyond those found in applicable statutes, regulations, treaties or other agreements."). Although the Tribes may disagree with the current state of Ninth Circuit caselaw, as it now stands, "unless there is a specific duty that has been placed on the government with respect to Indians, [the government's general trust obligation] is discharged by [the government's] compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Morongo Band of Mission Indians v. FAA,* 161 F.3d 569, 574 (9th Cir.1998); *see also Okanogan Highlands Alliance v. Williams,* 236 F.3d 468, 479 (9th Cir.2000), *Skokomish Indian Tribe v. FERC,* 121 F.3d 1303, 1308-09 (9th Cir.1997), *Inter Tribal Council of Arizona, Inc. v. Babbitt,* 51 F.3d 199, 203 (9th Cir.1995).[10]

In *Vigil,* the Tenth Circuit declined to find that, within the federal government's broad fiduciary obligations to Indian tribes, there lies a specific duty to provide free

[10] We are leaving open the question of whether the United States is required to take special consideration of tribal interests when complying with applicable statutes and regulations and when such an obligation may or may not arise. *See Island Mountain Protectors,* 144 IBLA at 185 (stating that, because the Tribes had treaties, "[the] BLM was required to consult with the Tribes and to identify, protect, and conserve trust resources, trust assets, and Tribal health and safety" in its administration of the NEPA and other environmental laws).

lunches to all Indian children. 667 F.2d at 934. Stating that "the federal government generally is not obligated to provide particular services or benefits in the absence of a specific provision in a treaty, agreement, executive order, or statute," the court concluded that language in treaties referring to the government's obligation to support and educate Indians was too broad and did not expressly impose a duty on the government to provide free lunches to all Indians. *Id.*

Similarly, in *Shoshone-Bannock Tribes,* the D.C. Circuit held that a provision in the Treaty of Fort Bridger of July 3, 1868, 15 Stat. 673, giving the tribes a right to hunt on "the unoccupied lands of the United States so long as game may be found thereon" did not impose a duty on the United States to litigate water-rights claims on the tribes' behalf. 56 F.3d at 1478, 1482 (internal quotation marks omitted). The court concluded that the broad provision within the Treaty "d[id] not suggest in the slightest that upon the Tribes' request, the United States is bound to file and defend meritless claims to water rights," and, "[w]ithout an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists[ ] it is a limited one only." *Id.* at 1482 (internal quotation marks omitted); *see also Miccosukee Tribe of Indians of Florida,* 980 F.Supp. at 456, 461, 463 (rejecting the tribes argument that the federal government had a fiduciary obligation to accede to its request to take certain actions to alleviate flooding on tribal land caused by Tropical Storm Gordon because "[t]he Tribe ha[d] not introduced evidence that the Federal Defendants assumed a duty under any of these statutes and agreements to provide the Tribe with the flood relief it has requested").

In this case, the Tribes argue that the government has failed to properly consider tribal interests in the approval and permitting of the Zortman and Landusky mining operations. Moreover, they argue that the BLM's failure to fully reclaim the mines and restore the quantity and quality of the Tribes' water resources constitutes an ongoing breach of the government's trust obligations. But their claim is no different from that which might be brought under the generally applicable environmental laws available to any other affected landowner, subject to the same statutory limitations. We also think this situation is unique from other cases where courts have required the United States to comply with a specific fiduciary obligation; here, the Tribes seek to impose a duty, not found in any treaty or statute, to manage non-tribal property for the benefit of the tribes. *Cf. United States v. Mitchell* (*Mitchell I*), 445 U.S. 535, 538, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) (holding that the United States does not have a specific fiduciary obligation to manage timber resources on allotted lands, held in trust for Indian-allotees); *United States v. Mason,* 412 U.S. 391, 393, 398, 400, 93 S.Ct. 2202, 37 L.Ed.2d 22 (1973) (finding that the United States had not breached its trust responsibility in the management of allotted land held in trust for a member of the Osage Tribe); *Seminole Nation,* 316 U.S. at 296-300, 62 S.Ct. 1049 (recognizing that the United States may have breached its fiduciary duty in its management of Indian annuities); *Minnesota v. United States,* 305 U.S. 382, 386, 59 S.Ct. 292, 83 L.Ed. 235 (1939) (stating that "the owner of the fee of the Indian allotted lands holds the same in trust for the allottees").

In *Mitchell I,* the seminal case dealing with the fiduciary trust obligations owed by the government to

federally recognized Indian tribes, the Supreme Court declined to find that the United States had a specific fiduciary obligation to manage timber resources on the allotted lands for the benefit of Indian-allottees, even when there was statutory language expressly recognizing that the United States held these lands in trust. 445 U.S. at 541-42, 100 S.Ct. 1349; *see also Marceau v. Blackfeet Housing Auth.*, 455 F.3d 974, 983 (9th Cir.2006) ("In *Mitchell I* . . . the Supreme Court found that the General Allotment Act, under which tribal land was taken into trust, created only a limited trust relationship between the United States and the tribal member as it related to timber management."). The Court noted that the General Allotment Act did not "*unambiguously* provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." *Mitchell I,* 445 U.S. at 542, 100 S.Ct. 1349 (emphasis added). Furthermore, neither its legislative history nor any of the events surrounding the Act's passage gave any indication that Congress intended "the Government to manage timber resources for the benefit of Indian allottees." *Id.* at 545, 100 S.Ct. 1349.

The Tribes argue that *Mitchell I* and *Mitchell II* apply only to claims for monetary damages. In other words, the Tribes contend that, when a party seeks monetary relief, *Mitchell I* and *Mitchell II* require a substantive source of law that establishes a specific fiduciary duty that can be fairly interpreted as mandating compensation for damages sustained as a result of a breach of the duty imposed. However, the Tribes contend that the government still maintains a general trust responsibility towards them and this responsibility exists for any federal action that relates to Indian tribes. Therefore, in their view – despite Ninth

Circuit caselaw to the contrary – this general trust obligation cannot be satisfied simply through facial compliance with statutory and regulatory requirements. And, for § 702 claims for non-monetary damages, the general trust obligation imposes duties on the federal government even in the absence of a specific treaty, agreement, executive order, or statute. However, we are not in a position to overrule prior precedent. In *Morongo Band of Mission Indians,* 161 F.3d 569, the Morongo Band of Mission Indians sought non-monetary relief under the APA. *Id.* at 573. Although we recognized that "the United States does owe a general trust responsibility to Indian tribes," we stated that "unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Id.* at 574; *see also N. Slope Borough v. Andrus,* 642 F.2d 589, 612 (D.C.Cir.1980) ("Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only."). This is the law of the circuit, and this is the law we must follow.

Here, the Tribes cite the Treaty of Fort Laramie, the Treaty with the Blackfeet, and the Grinnell Agreement as instances where the government has committed itself to specific fiduciary obligations in the management of water resources existing off of the Reservation. However, nowhere do we find the government "unambiguously agreeing" to manage off-Reservation resources for the benefit of the Tribes. *See Mitchell I,* 445 U.S. at 542, 100 S.Ct. 1349. Rather, at most, the treaties merely recognize a general or limited trust obligation to protect the Indians against

depredations on Reservation lands: an obligation for which we have no way of measuring whether the government is in compliance, unless we look to other generally applicable statutes or regulations.

Moreover, unlike *Mitchell I* and *Mitchell II,* where the tribes sought to impose a specific fiduciary obligation on the United States to manage timber located on *tribal* land, the Tribes here seek to impose a duty on the government to manage resources that exist off of the Reservation. Essentially, this amounts to a duty to regulate third-party use of non-Indian resources for the benefit of the Tribes. We are not aware of any circuit or Supreme Court authority that extends a specific *Mitchell*-like duty to non-tribal resources. Indeed, as we recently stated in *Marceau,* the government does not bear complete fiduciary responsibility unless it has "take[n] full control of a *tribally-owned* resource and manage[d] it to the exclusion of the tribe." 455 F.3d at 984 (emphasis added); *see also id.* at 984 ("[F]iduciary duties arise under *Mitchell* only where the federal government pervasively regulates a tribally-owned resource."); *Inter Tribal Council of Arizona, Inc.,* 51 F.3d at 203 (finding no *Mitchell*-like trust duty because "[t]he off-reservation school was not part of Indian lands, but was merely allocated by the BIA for use by the Tribes"). Therefore, because the tribes in *Marceau* failed to show how funding from the Department of Housing and Urban Development could be a tribal resource, the court held that no *Mitchell* fiduciary duty existed.

Nothing in the treaties or the Grinnell Agreement gives any indication that Congress intended to impose such a duty on the government. For instance, in the Treaty with the Blackfeet, the United States agreed to "protect said Indians against depredations and other unlawful acts

which white men residing in or passing through their country may commit." Treaty with the Blackfeet, art. 7. This provision obligates the government to protect only against those depredations that occur on Indian land. While we recognize that the area of concern in this case was actually considered to be a part of the Tribes' territory at the time the Treaty with the Blackfeet was ratified, it cannot be said that the United States agreed to manage that land for the benefit of the Tribes in perpetuity, even after the Tribes later relinquished their ownership in that land. Whatever duty exists at law today must be expressly set forth in statutes or treaties.

Moreover, we believe that this language gives some indication as to what Congress intended when it ratified the Treaty of Fort Laramie. In article 2 of that treaty, the Indian nations "recognize[d] the right of the United States Government to establish roads, military and other posts, within their respective territories." In article 3 of the treaty – upon which the Tribes rely – it reads: "In consideration of the rights and privileges acknowledged in the preceding article, the United States bind themselves to protect the aforesaid Indian nations against the commission of all depredations by the people of the said United States, after the ratification of this treaty." Treaty of Fort Laramie, art. 3.

When we read these two articles together it is clear that – as in the Treaty with the Blackfeet – the United States agreed to protect the Tribes from depredations that occurred only on tribal land. Although we recognize that activities occurring off of the Reservation may impact resources on the Reservation, the language in these treaties simply cannot be read to impose a specific fiduciary obligation on the government to manage non-tribal

resources, such as the clean-up of nearby gold mine tailings, for the benefit of the Tribes. As the Supreme Court has stated, the purposes of this treaty were to "assure safe passage for settlers across the lands of various Indian Tribes; to compensate the Tribes for the loss of buffalo, other game animals, timber, and forage; to delineate tribal boundaries; to promote intertribal peace; and to establish a way of identifying Indians who committed depredations against non-Indians." *Montana,* 450 U.S. at 557-58, 101 S.Ct. 1245; *see also id.* at 553, 101 S.Ct. 1245 (stating that the Treaty of Fort Laramie "chiefly represented a covenant among several tribes which recognized specific boundaries for their respective territories").

C

Because we conclude that the Tribes cannot allege an independent common law cause of action for breach of trust, we turn now to their statutory claim. In addition to its breach of trust claim, the Tribes also sought summary judgment against the government for allegedly failing to prevent unnecessary and undue degradation of public lands in violation of FLPMA.[11] The FLPMA is primarily procedural in nature, and it does not provide a private right of action. *Ctr. for Biological Diversity v. Veneman,* 394 F.3d 1108, 1111 (9th Cir.2005). Therefore, the Tribes sought relief under § 706(1) of the APA for failure to act.

[11] Specifically, the Tribes alleged that the government's failure to comply with NEPA, 42 U.S.C. §§ 4321-4347, and the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470-470x-6, constituted unnecessary and undue degradation.

In *Norton v. Southern Utah Wilderness Alliance,* 542 U.S. 55, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004), the Supreme Court stated that "[a failure to act claim] under [5 U.S.C.] § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take.*" *Id.* at 64, 124 S.Ct. 2373. As such, courts do not have the authority to "enter general orders compelling compliance with broad statutory mandates." *Id.* at 66, 124 S.Ct. 2373. Even assuming that the government has a common law trust obligation that can be tied to its statutorily mandated duties under FLPMA, the Tribes have no basis for arguing that these obligations require the government to take discrete nondiscretionary actions. Therefore, the district court properly dismissed the Tribes' "failure to act" claim for lack of jurisdiction.

In so far as the Tribes relied on the APA to assert a claim for relief based on alleged violations of NHPA or NEPA, the district court correctly determined that it lacked jurisdiction. Neither statute provides a private right of action; therefore, the Tribes must rely on the APA to state a claim. *See San Carlos Apache Tribe v. United States,* 417 F.3d 1091, 1098-99 (9th Cir.2005) (concluding that § 106 of the NHPA does not contain an implied right of action); *Turtle Island Restoration Network v. U.S. Dep't of Commerce,* 438 F.3d 937, 942 (9th Cir.2006) (recognizing that NEPA does not provide a private right of action). The only "final agency action" that occurred within the six-year statute of limitation period[12] is the now-vacated 1996

[12] The "general six-year statute of limitations for civil actions brought against the United States, *see* 28 U.S.C. § 2401(a), applies to actions for judicial review brought pursuant to the [APA]." *Wind River Mining Corp. v. United States,* 946 F.2d 710, 712-13 (9th Cir.1991).

ROD.[13] The district court properly concluded that because the Tribes could not allege an injury based on the 1996 ROD, they do not have standing to challenge that decision. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (stating that standing – at a minimum – requires (1) injury in fact, (2) a causal connection between the injury alleged and the challenged action, and (3) a likelihood that the injury will be redressed by a favorable decision). Therefore, the district court did not have jurisdiction over these APA claims.

IV

Finally, the Tribes argue that the district court abused its discretion by granting the government's motion for summary judgment based on a finding that remedies were not available at the conclusion of the liability phase and before the Tribes had an opportunity to present evidence pertaining to possible remedies. In its original order, the district court did state that "although damages have been bifurcated from liability, the lack of an effective remedy for any wrongs committed on the Tribes renders the exercise of judicial power superfluous, and the case moot." However, in its subsequent order, the district court clarified its reasoning. It explained that it chose to reconsider its prior ruling regarding jurisdiction sua sponte, and, because the Tribes did not have standing to challenge the only "final agency action" that had occurred within the applicable statute of limitation, it lacked jurisdiction to consider the Tribes' claims.

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[13] The Tribes do not challenge the 2001 SEIS or 2002 ROD.

It is now apparent that the district court did not grant the government's motion for summary judgment based on a lack of any effective remedy. Rather, the district court granted the government's motion because the Tribes' claims were either barred by the statute of limitation, not based on a "final agency action," or did not involve a controversy for which the Tribes had standing to pursue. A court has an obligation to consider its jurisdiction at every stage of the proceedings. *See Scholastic Entm't, Inc. v. Fox Entm't Group, Inc.*, 336 F.3d 982, 985 (9th Cir.2003). The parties had thoroughly briefed these issues when the district court initially considered the government's motion to dismiss. *Cf. id.* (stating that the district court's sua sponte dismissal for lack of jurisdiction did not deprive the appellant of due process because the parties had previously briefed the issue). Therefore, the district court did not abuse its discretion by reconsidering its jurisdiction at the conclusion of the liability phase.

V

Nothing within any of the statutes or treaties cited by the Tribes imposes a specific duty on the government to manage non-tribal resources for the benefit of the Tribes. Because the Tribes do not have a common law claim for breach of trust – i.e., one that can be raised independently of any applicable statutes or regulations – the Tribes are forced to rely on the APA for a private right of action. In applying the APA to the Tribes' claims, the district court properly concluded that the Tribes did not have standing to challenge the vacated 1996 EIS or ROD. Moreover, the Tribes did not have a cognizable failure to act claim because the Tribes could not assert that the government has failed to take a discrete agency action that it is legally

required to take. Therefore, the district court correctly dismissed the Tribes' claims for lack of jurisdiction.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

GROS VENTRE TRIBE, ASSINBOINE TRIBE, and the FORT BELKNAP INDIAN COMMUNITY COUNCIL, Plaintiffs, vs. UNITED STATES OF AMERICA; BUREAU OF LAND MANAGEMENT, an agency of the U.S. Department of Interior; BUREAU OF INDIAN AFFAIRS, an agency of the U.S. Department of Interior; and INDIAN HEALTH SERVICE, an agency of the U.S. Department of Health and Human Services, Defendants.	CV 00-69-M-DWM ORDER (Filed Jun. 28, 2004)

I. INTRODUCTION

This case is brought by the Gros Ventre and Assiniboine Tribes and the Fort Belknap Community Council ("Tribes"). The Assiniboine and Gros Ventre Tribes live on the Fort Belknap Reservation; the Fort Belknap Community Council is the governmental body of the Fort Belknap Indian community.

The Tribes challenge BLM decisions approving the operation, expansion, and reclamation of the Zortman and Landusky Mines, two open-pit cyanide heap-leach gold mines located on BLM and private lands in the Little

Rocky Mountains of northcentral Montana. The mines were first permitted in 1979, and closed in 1998. They were jointly permitted, and are now being reclaimed, by BLM and the Montana Department of Environmental Quality (DEQ). The parent corporation of both mines, Zortman Mining, Inc. (ZMI), is a wholly owned subsidiary of Pegasus Mining, Inc., which declared bankruptcy in 1998.

The Little Rockies were once wholly within the boundaries of the Fort Belknap Reservation, but were ceded to the federal government by the Tribes in the late 1800s for the purpose of allowing gold mining. The mines are surrounded on three sides by the Fort Belknap Reservation, but are not on the reservation. Some of the creeks flowing from the Little Rockies flow onto the reservation.

Between 1979 and 1994, BLM and DSL approved 11 amendments to the Zortman permit and plan of operations, and 10 amendments to the Landusky permit. Zortman CD, *AR Z02052,* scroll to Adobe 321-2, AR Z02373-4. Both mines had an original allowable disturbance of 529 acres. Plaintiffs' Exh. E at Table 1-1 and Table 1-2. By 1990, the total disturbance at the mines was 1215 acres. *Id.*

In 1992, Zortman announced plans to expand the mine. In response, BLM announced it would prepare an EIS to evaluate the expansion proposal. 57 Fed. Reg. 56588 (Nov. 1992).

That same year, DSL and BLM discovered acid rock drainage (ARD) at the mines. In response to the discovery of ARD, BLM ordered ZMI to submit modified plans of operations for both mines. A tribal corporation appealed those decisions to the IBLA on the grounds that the

Federal Land and Policy Management Act (FLPMA), 43 U.S.C.A § 1732, required the BLM to shut down the mines rather than impose conditions on their continued operations pending further NEPA review. *Red Thunder, Inc.*, 129 IBLA 219 (Apr. 29, 1994). The IBLA held that the BLM had discretion to order modifications rather than cessation of mining, and that the BLM's decisions did not violate its duty to prevent undue or unnecessary degradation of lands. 129 IBLA at 238, 249.

Meanwhile, the water quality issues caused by ARD did not go unnoticed by the permitting agencies. Montana DEQ filed suit in state court against ZMI for violations of the Montana Water Quality Act; BLM issued notices of non-compliance, which were appealed by ZMI to the IBLA; and the EPA issued violation notices under the Clean Water Act (CWA).

After preparing a supplemental Environmental Assessment (EA) of the proposed reclamation plans for Zortman and Landusky, the BLM decided to expand the scope of the expansion EIS to include mining and reclamation at Landusky. 59 Fed. Reg. 16656 (Apr. 7, 1994). The combined EIS was to provide a "comprehensive impacts analysis for deciding on future mine expansion and reclamation requirements at both operations." *Id.*

In June 1995, EPA filed suit against Pegasus Gold Corporation and ZMI in federal district court for violations of the CWA. CV 95-95-BLGS-JDS. The State of Montana filed a supplemental complaint, and the Tribes filed a separate suit, CV 95-96-BLGS-JDS, which was consolidated with the government's suit.

In the summer of 1996, Pegasus, ZMI, the United States, the State of Montana, the Port Belknap Community Council, the Gros Ventre and Assiniboine Tribes, and the Island Mountain Protectors entered into a Consent Decree resolving the federal CWA lawsuits "relating to the discharge of mine drainage and other mine wastewaters at or from the Defendants' Zortman and Landusky mines located next to the Fort Belknap Indian Reservation in northcentral Montana prior to the date of the lodging of the consent decree." 61 Fed. Reg. 41182 (Aug. 7, 1996). Pegasus and ZMI paid $1 million to the Tribes "in partial satisfaction of the Tribes' common law aboriginal water rights claim." *Id.* They also agreed to perform a human health study, an aquatic health, study, and a water system improvements project. *Id.*

Three months later, the BLM signed a Record of Decision (ROD) choosing Alternative 7 of the FEIS. The FEIS found that,

"The cumulative impact [of expanded mining under Alternative 7] is approximately 100 plus years of significant disruption to Native American traditional cultural practices in portions of the Little Rocky Mountains." 1996 FEIS, Exh. E to Plaintiffs' Facts, at 4-316.

The Tribes appealed the 1996 FEIS and ROD to the IBLA, which held that those documents did not comply with NEPA or FLPMA, and did not fulfill the government's trust obligations. *Island Mtn. Protectors*, 144 IBLA 168 (May 29, 1998). The IBLA found that the treaties between the Tribes and the government create a trust responsibility that may be "congruent" with the protections afforded by environmental laws, but is not diminished by them:

> BLM was required to consult with the Tribes and to identify, protect, and conserve trust resources, trust assets, and Tribal health and safety in making its October 1996 decisions. It will be required to do so on remand and to report on its actions in issuing a decision on the final reclamation plans.

144 IBLA at 185. The IBLA remanded the decisions to the BLM for further environmental review.

One month later, in June 1998, the BLM issued a new ROD in response to Pegasus Gold Corporation's announcement that it was filing for bankruptcy and would not be expanding Zortman. The new ROD chose a reclamation-only alternative, rather than a reclamation-expansion alternative. The IBLA vacated that ROD in November 1998 on the same grounds as it vacated the earlier decisions.

In response to the *Island Mountain Protectors* decision, ELM and DEQ engaged in consultation with the Tribes regarding reclamation of Zortman-Landusky. The agencies announced their decision to prepare a Supplemental EIS (SEIS) addressing reclamation at Zortman-Landusky in August 2000, four months after the lawsuit herein was filed. 65 Fed. Reg, 47800 (Aug. 3, 2000). The Draft SEIS was released in May 2001. 66 Fed, Reg. 24152 (May 1, 2001). The Final SEIS was released in February 2002. 57 Fed. Reg. 7191 (Feb. 15, 2002). BLM signed the ROD in May 2002.

II. PROCEDURAL BACKGROUND

The Tribes filed their Complaint in April 2000. The Tribes allege that past and ongoing impacts of the mines

have adversely affected tribal lands and resources, in violation of the federal government's trust responsibility to the Tribes and the Federal Land and Policy Management Act (FLPMA), 43 U.S.C. § 1732(b); 43 C.F.R. § 3809. They seek declaratory relief regarding these violations, a writ of mandamus compelling reclamation of the mine sites, and an injunction. They do not seek money damages.

The Tribes are not challenging the 2002 SEIS and ROD. In fact, they are not challenging any particular decision; rather, they seek a broad ruling that the BLM violated its trust responsibilities and its FLPMA obligations by approving operations at Zortman-Landusky over the past 25 years. They contend the Zortman-Landusky mines have negatively affected tribal resources in three particulars: 1) water quality, 2) water quantity, and 3) negative impacts to tribal cultural and spiritual practices through destruction of the Island Mountains, which is the ancestral name for the Little Rockies. They assert that the government breached its fiduciary obligation to them, and has violated FLPMA's mandate to prevent the undue and unnecessary degradation of public lands.

The Tribes rely on treaty language in which the United States promised to protect them against "all depredations by the people of the . . . United States," Plaintiffs' Exh. A at Art. 3 (Treaty of Fort Laramie, 11 Stat. 749 (Sept. 17, 1851)), and to protect the Tribes against "depredations and other unlawful acts which white men residing in or passing through their country may commit." Plaintiffs' Exh. B at Art. 7 (Treaty with the Blackfeet, 11 Stat. 657 (Apr. 15, 1856)).

The government contends it has upheld its trust obligation to Plaintiffs. It disputes the Tribes' claim that

mining has affected water quantity and water quality on the reservation, and asserts that BLM has acted to prevent on-reservation impacts from mining activities. Finally, it contends it has not breached its trust obligation involving Plaintiffs' cultural resources because no off-reservation lands in the area of Zortman-Landusky are held in trust for the Tribes.

Additionally, the government contends this case must be reviewed pursuant to the APA, which means the Tribes must identify a final agency action that took place within the 6-year statute of limitations, i.e., after April 1994.

The government also contends that water quantity issues cannot be resolved by this court because of ongoing water rights litigation in the Montana court system. It cites *State Eng'r of State of Nevada v. South Fork Band of Te-Moak Tribe of Western Shoshone Indians of Nevada*, 339 F.3d 804 (9th Cir. 2003), for the doctrine of prior exclusive jurisdiction. Because water rights adjudication is *in rem,* and the Tribes' reserved water rights are being adjudicated in the Montana water court, the government contends this Court does not have jurisdiction. The Tribes respond that this isn't about water "rights," but about the government's trust obligation to protect the Tribes' water.

As an alternative to its summary judgment motion, the government has moved for a stay pending resolution of related litigation in state court and at the IBLA. The Tribes have apparently filed suit in state court against the DEQ over the reclamation plans for Zortman-Landusky, and have appealed the BLM's decision approving the 2002 SEIS to the IBLA on the grounds that it violates the government's trust responsibility and FLPMA.

The Tribes respond that those lawsuits are irrelevant to this lawsuit. They also assert that because the IBLA held that the 1996 EIS and ROD violated NEPA and FLPMA, they have exhausted their remedies; thus, they assert, whether the government violated its trust obligations in its 1996 decisions is "squarely before this Court." Plaintiffs' Opposition to Defendants' Motion for Continuance, at 8 n.4.

Oral argument was held on the cross-motions for summary judgment April 29, 2004. Both parties agree the government has a trust obligation to the Tribes that extends to off-reservation activities affecting tribal lands and resources. The issue is whether the government violated that obligation as well as its FLPMA obligations through its various approvals of the Zortman-Landusky mining operations.

III. STANDARD OF REVIEW

Standard of review is an essential component of judicial review of agency decisionmaking. The court never steps into the shoes of an agency to conduct a *de novo* review of an action as technically grounded as approval of a gold mine. Rather, it measures the agency's actions against an objective standard; if the plaintiffs fail to prove that the action was so unreasonable as to be arbitrary and capricious, based upon the record before the agency at the time it made its decision, the Court rules in the plaintiff's favor. Otherwise, the Court defers to the agency's expertise.

The Court is mindful of the general trust obligations imposed upon the government as well as the more specific obligations created by treaties. The Tribes argued at oral

argument that these trust obligations limit the BLM's discretion such that any discretion must always be exercised in favor of the trust beneficiary. It may be that the government's trust obligations create a less deferential standard of judicial review of agency actions; however, I do not believe either the Court or the government is required to defer completely to tribal interests.

Additionally, the Tribes raise their claims of a breach of trust obligations without regard for the familiar structures of administrative law, and in spite of the fact that no equitable remedy can be fashioned that will undo what has already been done. Neither the APA nor constitutional requirements for standing sanction this approach.

The APA provides the framework for judicial review of agency action once jurisdiction is established. *San Carlos Apache Tribe v. United States*, 272 F.Supp.2d 860, 882-83 (D. Ariz. 2003). When judicial review is not governed by a substantive statute, but by the general provisions of the APA, the plaintiffs must identify a final agency action which has adversely affected or aggrieved them. 5 U.S.C. § 702. This is not an idle requirement from the court's perspective. In the absence of an identifiable agency action being challenged by the Tribes, it is difficult to evaluate the procedural aspects of the claim as well as the proper standard of review, which the Tribes never articulate.

Additionally, although damages have been bifurcated from liability, the lack of an effective remedy for any wrongs committed on the Tribes renders the exercise of judicial power superfluous, and the case moot. Other than final reclamation of the mines, the actions of which the Tribes complain either cannot be undone or have already been undone.

Rarely does a court have the opportunity to evaluate whether an agency action was arbitrary and capricious after the fact. This is true for a number of reasons, not the least of which is that equitable relief is almost always prospective. Except in unique circumstances, which are not present here, equity cannot undo an action already taken. Professor Mary Christina Wood, an Indian trust law scholar, explains that there are two distinct ways in which Tribes invoke the trust doctrine in environmentally related cases: either they seek injunctive relief under the APA, or they seek monetary damages against the BIA for mismanagement of Indian lands. Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 Tulsa L.R. 355, 364 (Winter 2003). The first is important "because injunctive relief seeks to stop damage before it happens." *Id.* The second is important because it provides compensation once the wrong has been committed.

Here, these two distinct invocations of the trust doctrine are mixed together into a confusing amalgam. It appears that the only remedy which will redress the Tribes' injuries is reclamation of the mine sites, which is taking place pursuant to the 2002 SEIS and ROD. While water treatment may be required in perpetuity, equitable relief cannot alter that fact. If the Tribes have to further treat the water for their own use, they may be able to seek damages for that expense. Perhaps the Tribes would have a claim for damages under a nuisance theory, but they have not pled that claim. They *have* filed a Clean Water Act claim against the mine owner and DEQ in a separate proceeding, under which they could recover civil penalties.

Assiniboine & Gros Ventre Tribes v. Ployhar, CV 04-17-M-DWM (filed Jan. 29, 2004).

It is undisputed that the Zortman-Landusky mines have devastated portions of the Little Rockies, and will have effects on the surrounding area, including the Fort Belknap Reservation, for generations. That devastation, and the resulting impact on tribal culture, cannot be overstated.

However, this Court sitting in equity has little to offer the Tribes until and unless they seek judicial review of the 2002 SEIS and ROD. Reclamation is taking place at Zortman-Landusky. Whether or not that reclamation is sufficient is not a question over which this Court has jurisdiction, although both parties seek judgment in their favor on that issue. The Plaintiffs did not challenge the 2002 SEIS and ROD in their Complaint. Moreover, the Plaintiffs have a pending appeal to the IBLA over those decisions. I have no basis for jurisdiction, and decline to rule.

While the Tribes have challenged the BLM's 1996 EIS and ROD, those decisions were vacated by the IBLA, and have been supplemented by the 2002 SEIS and ROD. Reviewing the earlier decisions without reviewing the decision supplementing those decisions would be a futile exercise. More importantly, the only remedy for a defective EIS has already been undertaken by the BLM in the form of the 2002 SEIS.

For these reasons, IT IS HEREBY ORDERED that the Tribes' motion for summary judgment (Dkt. # 97) is DENIED, and the BLM's motion for summary judgment (Dkt. # 102) is GRANTED. IT IS FURTHER ORDERED

that the BLM's motions to stay or continue proceedings (Dkt. # 102, 11, 115) are DENIED as moot.

The Clerk of Court is directed to enter judgment in favor of defendant consistent with this Order.

The Clerk of Court is directed to notify the parties of the making of this Order.

DATED this 28th day of June, 2004.

/s/ Donald W. Molloy
Donald W. Molloy, Chief Judge
United States District Court

344 F.Supp.2d 1221

United States District Court, D. Montana, Missoula Division. GROS VENTRE TRIBE, Assinboine Tribe, and the Fort Belknap Indian Community Council, Plaintiffs,

v.

UNITED STATES of America; Bureau of Land Management, an agency of the U.S. Department of Interior; Bureau of Indian Affairs, an agency of the U.S. Department of Interior; and Indian Health Service, an agency of the U.S. Department of Health and Human Services, Defendants.

No. CV 00-69-M-DWM.

Oct. 22, 2004.

Michael Axline, Eugene, OR, Robert T. Coulter, Andrew Huff, Helena, MT, Amy R. Atwood, for Plaintiffs.

Lori Caramanian, U.S. Department of Justice, Denver, CO, Silas DeRoma, U.S. Department of Justice, Washington, DC, for Defendants.

ORDER

I. Introduction

On July 12, 2004, Plaintiffs made a timely motion pursuant to Fed. Rule Civ. P. 59(e) to alter or amend the Court's June 29, 2004 Order granting summary judgment to the BLM. Amendment or alteration is appropriate under Rule 59(e) if (1) the district court is presented with newly discovered evidence, (2) the district court committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law. *School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir.1993).

Plaintiffs' motion is premised on the second criterion, clear error or manifest injustice. They contend they were never given an opportunity to brief the issue of remedies, the lack of which was held to be fatal to their claim, and that the Court's Order is inconsistent with its 2001 Order denying the government's motion to dismiss. They ask that the Court vacate its judgment and either deny the government's motion for summary judgment and grant Plaintiffs' motion for summary judgment as to liability, or allow Plaintiffs to brief the issue of remedies. The Tribes contend that the Court's finding of "the lack of an effective remedy for any wrongs committed on the Tribes" in the absence of briefing on that particular issue is fundamentally unfair. They argue that declaratory relief would "clarify the legal obligations of federal agencies to tribal governments in federal decisions which affect tribal interests and rights," and that the Court could order the government to, among other things, build a water treatment system at the headwaters of King Creek. They cite to the earlier ruling on the motion to dismiss as well as a ruling denying the government's motion for a protective order, both of which stated that the Tribes' trust claims were distinct from their APA claims, and could not be treated as typical administrative record-review cases.

The government argues in opposition that the Plaintiffs have failed to meet any of the criteria for amending a judgment; that the Court's order is properly interpreted as finding that the Plaintiffs lacked standing due to lack of redressability; that the Court was correct in holding that the breach of trust claim must be reviewed under the APA; that Plaintiffs had ample opportunity to brief the issue of standing, even though the arguments were not denominated as such; and that Court is required to examine its

jurisdiction *sua sponte* at every stage of the proceedings. The government also points out that the court is free to reconsider any of its previous rulings. "Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so." *Renne v. Geary,* 501 U.S. 312, 316, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991).

In November 2001, this Court denied the government's motion to dismiss on the grounds that the Tribes had stated a cognizable common-law breach of trust claim. It understood the Tribes' claim to be a common-law claim separate from the APA, thereby not requiring an identifiable final agency action subject to a statute of limitations defense. It has reconsidered that ruling *sua sponte,* and held implicitly in its June 29 Order and judgment that a common-law breach of trust claim must, as a jurisdictional matter, be analyzed within the framework of the APA. Within that framework, the Tribes' claims fail on a number of grounds.

The briefs on this motion suggest that the Court's June 29 decision was not as clear as it could have been in its analysis and discussion of the Tribes' claims. The Court will deny the motion to amend, but will take this opportunity to clarify its reasoning.

II. Factual Background

The Zortman and Landusky Mines are in the Little Rocky Mountains, on a mix of private and federal land. The Little Rockies were once wholly within the boundaries of the Fort Belknap Reservation, but were ceded to the federal government by the Tribes in the late 1800s. The mines are surrounded on three sides by the Fort Belknap

Reservation, but are not on the reservation. Some of the creeks flowing from the Little Rockies flow onto the reservation.

Zortman and Landusky were originally permitted in 1979 by the Montana Department of State Lands. Both mines used cyanide heap-leach processing of gold. In 1979, mining operations undertaken on public lands pursuant to the General Mining Law of 1872, 30 U.S.C. § 22 *et seq.*, did not require any review or approval from the BLM. Nonetheless, BLM commented on the Draft Environmental Impact Statement (DEIS) in a letter dated March 19, 1979. Regarding surface water quality, the BLM stated, "Our studies indicate high concentration of arsenic flowing from the Gold Bug Adit present at Montana Gulch Campground." Regarding groundwater quality, the BLM stated, "The water discharged from the Gold Bug Adit, with its high concentration of arsenic, has an extremely negative impact on the Montana Gulch campground and all landowners downstream from the mining area." In February 1993, the Montana Department of State Lands first disclosed that the mines were leaching acid rock drainage (ARD).

BLM became involved in the approval of mining operations at Zortman and Landusky in 1981 – when its surface management regulations became effective – for those portions of the two projects that were on BLM-administered lands. 45 Fed.Reg. 78902 (Nov. 26, 1980) (adopting first set of regulations at 43 C.F.R. Part 3809). In 1981, the State and BLM entered into a Memorandum of Understanding (MOU) to address "cooperative procedures for mines that were in existence prior to the effective date of the 43 CFR 3809 regulations." In 1984, the State and BLM entered into an MOU to address "the

administration of plans of operations filed after the effective date of the regulations and involving greater than 5 acres of surface disturbance pursuant to 43 CFR 3809.1."

After granting the initial permits to ZMI, the State, acting through the DSL and its successor the Montana Department of Environmental Quality (MDEQ), granted a number of amendments to the permits for both mines.

BLM approved modifications to the operating permit in March 1994, but deferred further approval on expansion pending completion of an EIS. Following preparation of the EIS, BLM approved additional permits for expansion and reclamation plans in 1996; however, the Interior Board of Land Appeals (IBLA) vacated the decision. *Island Mountain Protectors, National Wildlife Federation, Assiniboine and Gros Ventre Tribes, & Fort Belknap Community Council,* IBLA 97-76, 97-77, 97-85 (May 29, 1988). The IBLA decision was never appealed, Pegasus declared bankruptcy in 1998, and the proposed expansion never took place.

The mines closed in 1998. They are now jointly operated, and being reclaimed, by BLM and the Montana Department of Environmental Quality (DEQ). BLM and Montana DEQ released a Supplemental EIS to the 1996 EIS in 2002, examining six reclamation alternatives for each mine. 67 Fed.Reg. 7191-01 (Feb. 15, 2002). BLM subsequently issued a Record of Decision adopting the preferred alternatives. Plaintiffs have appealed that decision to the IBLA. Those reclamation plans are not part of Plaintiffs' lawsuit herein.

The Tribes allege in their Complaint that past and ongoing impacts of the mines have adversely affected tribal lands and resources, in violation of the federal

government's trust responsibility to the Tribes and the Federal Land and Policy Management Act (FLPMA), 43 U.S.C. § 1732(b); 43 C.F.R. § 3809. They seek declaratory relief regarding these violations, a writ of mandamus compelling reclamation of the mine sites, and an injunction. They do not seek money damages.

III. Analysis

A. Subject Matter Jurisdiction: APA Requirements

Jurisdiction over any suit against the government requires a clear waiver of sovereign immunity by the United States. *United States v. Mitchell,* 445 U.S. 535, 538-539, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980) (*Mitchell I*). Additionally, it requires a claim falling within the terms of the waiver. *United States v. Mitchell,* 463 U.S. 206, 216-217, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (*Mitchell II*). The terms of the government's consent to be sued must be "unequivocally expressed." *Mitchell I,* 445 U.S. at 538, 100 S.Ct. 1349. This is true even when Indian tribes are suing the government for breach of its trust responsibilities. *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 472, 123 S.Ct. 1126, 155 L.Ed.2d 40 (2003).

When a plaintiff sues the government for damages, the waiver may be found in a statute such as the Tucker Act, 28 U.S.C. § 1491, the Indian Tucker Act, 28 U.S.C. § 1505, or the Federal Tort Claims Act, 28 U.S.C. § 2671. When a plaintiff sues the government for equitable relief,

waiver may be found in the Administrative Procedures Act. 5 U.S.C. § 702.[1]

The Tribes agree that the government's waiver of sovereign immunity for this lawsuit is found in the APA, and that the APA waives sovereign immunity for the common-law trust claim as well as for the FLPMA claim. They also contend, and this Court initially agreed, that although the APA supplies the waiver of sovereign immunity for the common-law trust claim, all other requirements of that statute do *not* apply. Because this issue goes directly to the Court's jurisdiction, it must be considered at every stage of the proceedings.

According to the plain language of the APA, the Court has jurisdiction only over "[a]gency action made reviewable by statute" and "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Because the actions complained of by the Tribes are not reviewable under a particular statute, the Court's jurisdiction must rest upon the challenged action being a "final agency action." This is true whether the claim challenges an action taken by an agency or a failure to take a specific act. *Norton v. Southern Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004). The

[1] "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." 5 U.S.C. § 702.

question presented is whether the final agency action requirement applies to a "common-law trust" claim.

The Court recognizes that the federal government has an enforceable fiduciary duty toward the Tribes, and that the Tribes may bring a claim against the government for mismanaging tribal property. Here, however, the claim is for mismanaging property *adjacent to* tribal property. As noted in this Court's 2001 decision, such a claim bears more resemblance to nuisance and trespass than to an APA claim. A nuisance/trespass claim may seek damages or injunctive relief; here, the Tribes seek only injunctive relief.

For jurisdictional purposes, the nature of the relief sought determines the source of the sovereign immunity waiver. The hypothetical nuisance case seeking injunctive relief would still require waiver of sovereign immunity, as would the same case seeking money damages. Regardless, the source of the waiver determines the necessary prerequisites to the Court's jurisdiction. Regardless of whether the Tribes *could* have pled a cognizable claim seeking damages, they did not.

Thus, because the APA waives the government's sovereign immunity, the APA establishes the necessary prerequisites to the court's jurisdiction. "[T]he terms of [the government's] consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood,* 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941). Judicial review under § 702 is expressly conditioned, under § 704, on the existence of a "final" agency action. In determining whether an agency action is final, "[t]he core question is whether the agency has completed its decisionmaking process, and whether the

result of that process is one that will directly affect the parties." *Franklin v. Massachusetts,* 505 U.S. 788, 797, 112 S.Ct. 2767, 120 L.Ed.2d 636, (1992).

This is not a case where the government has not taken a final action; every permit, every environmental impact statement, every Record of Decision is a final agency action. Nonetheless, particular actions being challenged by the Tribes must be identified for this Court to have jurisdiction over the Tribes' claims.[2] Moreover, once final agency actions are identified, the government may assert (as it has) statute of limitations defenses.

B. The Trust Obligation: Applying the Law

Judicial review under the APA requires finding law to apply. *Heckler v. Chaney,* 470 U.S. 821, 834-835, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985). The Tribes claim the law to be applied is the government's trust obligation. However, the Court cannot find any cases in which that obligation has been applied outside the framework of another law.

In the absence of a specific duty, or specific control over tribal property, the government fulfills its obligations as a trustee for the Tribes if it complies with applicable statutes. *Morongo Band of Mission Indians v. F.A.A.,* 161 F.3d 569, 574 (9th Cir.1998). The Tribes disagree with this rule; however, it is the law of this Circuit and I am bound to follow it.

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[2] This is as true for Plaintiffs' failure-to-act claim under FLPMA as it is for their common-law trust claim. *Norton v. SUWA,* 542 U.S. 55, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004).

I have read Professor Mary Christina Wood's law review articles discussing the government's trust obligation to Indians, as well as many of the cases that she cites. *See, e.g.,* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited,* 1994 Utah L.Rev. 1471; Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies,* 39 Tulsa L.R. 355 (Winter 2003). Nowhere do I find judicial support for the notion that the trust obligation can be enforced independently of some other source of law.

For instance, in *Blue Legs v. Bureau of Indian Affairs,* 867 F.2d 1094 (8th Cir.1989), individual tribal members sued the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS), as well as their own tribe, to force cleanup of several dumps on reservation land. The district court held, and the Eight Circuit affirmed, that all three defendants were liable for cleaning up the dumps under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.* The Eighth Circuit then held that the statutory duties of the BIA and IHS were "*buttressed* by the existence of the general trust relationship between these agencies and the Tribe." *Id.* at 1100 (emphasis added).

Similarly, the Ninth Circuit articulated a relevant rule regarding the trust obligation in *Morongo Band.* 161 F.3d at 574. The Court looked at *Mitchell I* and *Mitchell II* and concluded that the Supreme Court's holdings regarding the government's trust responsibility arose from specific statutes and regulations imposing particular duties on the government, as well the important fact in *Mitchell II* that the government had "assume[d] such

elaborate control over forests and property belonging to Indians." *Id.* (quoting *Mitchell II,* 463 U.S. at 225, 103 S.Ct. 2961). It held that unless a specific duty to act is imposed upon the government, its trust obligation to the tribes is fulfilled by complying with applicable statutes.

Here, the BLM's control has been exercised over non-tribal land. Even if the Court assumes the truth of Plaintiffs' allegation that those non-reservation activities have affected tribal property, the trust obligation is not elevated to an independent source of law.

Plaintiffs cite a statement from *Northern Cheyenne v. Hodel,* 32 I.L.R. 3065 (D.Mont.1985), in which the court said, "a federal agency's trust obligation to a tribe extends to actions it takes off a reservation which uniquely impact tribal members or property on a reservation." *Id.* at 3071. *Northern Cheyenne* involved the sale of coal leases by the BLM. The district court held that the government violated NEPA, 42 U.S.C. § 4321 *et seq.,* as well as the Federal Coal Leasing Amendments, 30 U.S.C. § 201, and that it failed to fulfill its trust obligations to the Tribe. *See Northern Cheyenne v. Lujan,* 804 F.Supp. 1281, 1285 (D.Mont.1991). The BLM had sold the leases without considering the impacts of the sale on the adjacent tribe. There is no indication that the *Northern Cheyenne* court relied on the trust obligation outside the context of other applicable laws. Moreover, the remedies in *Northern Cheyenne* – an order to prepare a supplemental EIS that considered the impacts on the tribe, an order directing the Secretary to follow his own regulations, which required consulting with the tribe – reflect the underlying laws that were violated, i.e., NEPA and the BLM regulations under the FCLA. Here, the government contends that it has fulfilled its trust obligations through the SEIS process. The Plaintiffs

dispute that contention – but that dispute is not properly before this Court.

The only statute under which the Tribes challenge the BLM here is the Federal Land and Policy Management Act (FLPMA), 43 U.S.C. § 1701 *et seq.* That challenge is brought under APA § 706(1) for failure to act to prevent undue degradation of tribal lands by failing to adhere to NEPA and the National Historic Preservation Act (NHPA). The requirements for "failure-to-act" claims have recently been clarified by the United States Supreme Court. *Norton v. Southern Utah Wilderness Alliance (SUWA),* 542 U.S. ___, 124 S.Ct. 2373, 159 L.Ed.2d 137 (2004). There, SUWA claimed that by allowing off-road vehicles in certain Wilderness Study Areas (WSAs), BLM was violating its statutory mandate to manage WSAs "so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c); 542 U.S. at ___, 124 S.Ct. at 2380. The Court held, *inter alia,* that the act sought to be compelled under 706(1) must be a specific, discrete action that is legally required. 542 U.S. at ___, 124 S.Ct. at 2379. As the Court stated:

> The principal purpose of the APA limitations we have discussed – and of the traditional limitations upon mandamus from which they were derived – is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve. *If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved – which would mean that it would ultimately become the task of*

> *the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.*

Id. at 2381 (emphasis added).

In other words, courts may not issue broad declaratory judgments that an agency has failed to comply with its statutory mandate. Yet this is exactly what the Tribes are asking the Court to do – to exercise its broad equitable relief, declare the BLM in violation of its broad trust obligations, and fashion particular remedies such as instructing the BLM to construct a passive water treatment system at the headwaters of King Creek. *See* Plaintiffs' Reply Brief, at 4 (giving examples of remedies the Court could grant). If courts are prohibited from entering general orders directing agencies to follow the law prospectively, they can hardly be empowered to enter an order observing in retrospect that the agency failed to implement the law and ordering it to take actions that the Court believes are proper.

Moreover, other than declaratory pronouncements that the BLM did in fact violate the law, the injunctive relief sought by the Tribes is directed at either (a) preventing further disturbance of the land, or (b) reclaiming the disturbed lands. Plaintiffs' Reply Brief, at 4. Those remedies are aimed at reclamation of the mines, whether they are specifically included in the 2002 reclamation plan or not. The BLM has already exercised its discretion and expertise by adopting the 2002 Reclamation ROD and SEIS, thereby superseding previous decisions and fashioning a remedy for the Tribes' injuries. Even if the Court could find law to apply, it would be inserting itself into an ongoing administrative process by exercising its equitable

powers to fashion suitable remedies for the tribes. Moreover, the fact that the operative decision at the mines is a reclamation plan, and the fact that the mines are no longer operating, casts serious doubt on the Court's jurisdiction to judicially review BLM's earlier decisions.

C. Statute of Limitations

"Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). The six-year statute of limitations begins to run when the right of action first accrues, which, under the APA, is generally the time of the final agency action. 5 U.S.C. § 704.

Having identified the final agency actions that may be challenged by the Tribes in this Court, it must next be determined whether the statute of limitations bars any of the Tribes' claims. The statute of limitations is a condition of the sovereign's consent to be sued. *United States v. Kubrick,* 444 U.S. 111, 117, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979).

As is clear from the plain language of the statute, "every civil action commenced against the United States" is subject to the six-year statute of limitations. The statute begins to run when a plaintiff has all necessary facts underlying his claims. *Kubrick,* 444 U.S. at 122, 100 S.Ct. 352. It is not tolled pending the plaintiff's understanding of the legal implications of those facts. *Id.*

The complaint herein was filed on April 12, 2000. The Tribes' challenge is therefore limited to final agency actions taken after April 12, 1994.[3]

The BLM first commented on the Zortman Landusky mines in 1979; it first approved the mines in 1981. The last permitting decision was made in 1996, when the BLM authorized a significant expansion of the mine; however, that decision was vacated by the IBLA, and never implemented due to the bankruptcy of Pegasus Gold Corporation. In fact, rather than expanding Zortman-Landusky, BLM and the state have since been reclaiming them. Moreover, the most recent final agency actions taken by the BLM are decisions approving reclamation alternatives, not decisions approving continued operations.

The government asserts that the last agency decisions regarding active operations at Zortman-Landusky were made in February 1991. The Plaintiff disputes that, asserting that the last decision made was on October 25, 1996. This Court agreed with Plaintiffs' assertion in its 2001 order denying the motion to dismiss; however, it did not examine the effect of the IBLA's subsequent order vacating the ROD on the Tribes' standing or on the fitness of the claim for judicial review.

It is difficult to see how a decision that was made but never implemented – and subsequently superseded by another final agency action, i.e., the reclamation plan – can have caused an injury in fact. *Lujan v. Defenders of*

[3] The Tribes argued that the "continuing violations" doctrine prevents the application of a statute of limitations defense. However, that doctrine has evolved in the context of tort and nuisance law; it is not applicable in the context of an APA claim for judicial review.

Wildlife, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Lacking an injury flowing from the 1996 decision, the Tribes do not have standing to challenge the 1996 decision.

It is equally logical to conclude that any decisions made to expand the mines are moot. These mines are no longer operating; any injury being caused by them is the result of permitting decisions that are no longer in effect, and will never again be made at these mines. In a similar situation where a Record of Decision was vacated by a lower court, the Ninth Circuit stated:

> As the environmental impact statement supplement upon which the 1992 ROD was based must be supplemented in light of our decision in [*Oregon Natural Resources Council v. Marsh*, 52 F.3d 1485 (9th Cir.1995)] *Marsh VII, that record of decision can no longer be taken as the Corps' operative decision.* Accordingly, we must decline to give an advisory opinion as to its sufficiency.
>
> *Oregon Natural Resources Council v. Harrell,* 52 F.3d 1499, 1508 (9th Cir.1995) (emphasis added). If the 1996 EIS and ROD are no longer the BLM's operative decisions, they are not final agency actions subject to judicial review, and an earlier final agency action must be identified.

It appears from the record that the BLM approved modifications to ZMI operating permits in March 1994, which is outside the statutory time frame. Therefore, the Tribes' claims are barred by 28 U.S.C. § 2401(a).

D. Mootness

The Tribes concede there is "a live controversy over whether the latest [reclamation] plan will provide an adequate remedy" for their injuries. However, that controversy is not before this Court, although documents from the SEIS were filed with the Court and cited to by both parties. That controversy is before the IBLA, where the Tribes are challenging the reclamation plan. Both parties have the right to appeal the IBLA's ultimate decision to this Court, at which time the Court will have jurisdiction to rule on the adequacy of the reclamation plan.

The controversy that *is* before this Court has to do with approval of mine operations that led to the acid rock drainage in the first place. That, however, is not a live controversy. The mines have closed; there is no indication they will reopen. The Tribes' claims for relief are not aimed at mine operation, but instead at mine reclamation.

It is in this way that the remedy is relevant to liability. Mootness is jurisdictional; if no case or controversy is presented to the Court, there can be no jurisdiction under Article III.

"[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack,* 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). "Mootness can be characterized as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Cook Inlet Treaty Tribes v. Shalala,* 166 F.3d 986, 989 (9th Cir.1999) (internal quotation marks omitted). Mootness is jurisdictional; "federal courts have no jurisdiction to hear a case

that is moot, that is, where no actual or live controversy exists." *Id.* Importantly, "If there is no longer a possibility that an appellant can obtain relief for his claim, that claim is moot and must be dismissed for lack of jurisdiction." *Ruvalcaba v. City of L.A.*, 167 F.3d 514, 521 (9th Cir.1999).

Plaintiffs assert correctly that the "test for mootness in cases such as this is a stringent one." *United States v. Concentrated Phosphate Export Assoc., Inc.*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968). A defendant's voluntary cessation of wrongful conduct rarely moots the need for injunctive relief because the defendant can simply begin the wrongful activity again: "Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'" *Id.* (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953)); *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1238 (9th Cir.1999).

Plaintiffs focus on the fact that acid rock drainage and other pollution from the mines is ongoing to argue that the BLM's wrongful conduct has not stopped and is likely to continue into the future. But BLM's alleged wrong was not in *causing* the pollution; it was in permitting the mines without adequate consideration of tribal interests. The pollution may be ongoing, but the remedy for that harm lies *not* in enjoining the BLM from approving further expansions. They have already ceased doing so; the mines have been closed for six years, and substantial reclamation work has taken place. The likelihood of the mines reopening appears minuscule – which is why the Plaintiffs do not seek an order closing the mines, or amending the terms of the operating permit. They seek cleanup, remediation, reclamation. Whatever label one chooses to apply, the

outcome the Tribes seek falls within the general ambit of the 2002 Reclamation Plan.

For these reasons, the BLM's cessation of mine permitting is jurisdictionally significant. That allegedly wrongful conduct is unlikely to recur. The only wrongful conduct that *is* likely to occur has to do with reclamation. Thus, the earlier decisions are moot, and the reclamation decision has not been brought before this Court. Either way, the Court lacks jurisdiction over the Tribes' claims.

IV. Order

Based on the foregoing, IT IS HEREBY ORDERED that the Plaintiffs' motion to amend the judgment (dkt # 125) is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GROS VENTRE TRIBE; et al., Plaintiffs-Appellants, v. UNITED STATES OF AMERICA; et al., Defendants-Appellees.	No. 04-36167 D.C. No. CV-00-00069-DWM District of Montana, Missoula ORDER (Filed Mar. 16, 2007)

Before: TALLMAN and BYBEE, Circuit Judges, and HUFF,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judges Tallman and Bybee have voted to deny the petition for rehearing en banc, and Judge Huff so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

* The Honorable Marilyn L. Huff, United States District Court for the Southern District of California, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GROS VENTRE TRIBE; et al., Plaintiffs-Appellants, V. UNITED STATES OF AMERICA; et al., Defendants-Appellees.	No. 04 [illegible] 167 D.C. No. CV-00-00069-DWM **JUDGMENT**

Appeal from the United States District Court for the District of Montana (Missoula).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana (Missoula) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered 11/13/06

11 Stat 749

The Office of the President of the United States

(TREATY)

TREATY OF FORT LARAMIE WITH SIOUX, ETC., 1851.

September 17, 1851.

Articles of a treaty made and concluded at Fort Laramie, in the Indian Territory, between D. D. Mitchell, superintendent of Indian affairs, and Thomas Fitzpatrick, Indian agent, commissioners specially appointed and authorized by the President of the United States, of the first part, and the chiefs, headmen, and braves of the following Indian nations, residing south of the Missouri River, east of the Rocky Mountains, and north of the lines of Texas and New Mexico, viz, the Sioux or Dahcotahs, Cheyennes, Arrapahoes, Crows, Assinaboines, Gros-Ventre Mandans, and Arrickaras, parties of the second part, on the seventeenth day of September, A.D. one thousand eight hundred and fifty-one.[FNA]

ARTICLE 1

The aforesaid nations, parties to this treaty, having assembled for the purpose of establishing and confirming peaceful relations amongst themselves, do hereby covenant and agree to abstain in future from all hostilities whatever against each other, to maintain good faith and friendship in all their mutual intercourse, and to make an effective and lasting peace.[FNB]

ARTICLE 2

The aforesaid nations do hereby recognize the right of the United States Government to establish roads, military and other posts, within their respective territories.[FNC]

ARTICLE 3

In consideration of the rights and privileges acknowledged in the preceding article, the United States bind themselves to protect the aforesaid Indian nations against the commission of all depredations by the people of the said United States, after the ratification of this treaty.[FND]

ARTICLE 4

The aforesaid Indian nations do hereby agree and bind themselves to make restitution or satisfaction for any wrongs committed, after the ratification of this treaty, by any band or individual of their people, on the people of the United States, whilst lawfully residing in or passing through their respective territories.[FNE]

ARTICLE 5

The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz:[FNF]

The territory of the Sioux or Dahcotah Nation, commencing the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Bute, or where the road

leaves the river; thence along the range of mountains known as the Black Hills, to the head-waters of Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning.[FNG]

The territory of the Gros Ventre, Mandans, and Arrickaras Nations, commencing at the mouth of Heart River; thence up the Missouri River to the mouth of the Yellowstone River; thence up the Yellowstone River to the mouth of Powder River in a southeasterly direction, to the head-waters of the Little Missouri River; thence along the Black Hills to the head of Heart River, and thence down Heart River to the place of beginning.[FNH]

The territory of the Assinaboin Nation, commencing at the mouth of Yellowstone River; thence up the Missouri River to the mouth of the Muscle-shell River; thence from the mouth of the Muscle-shell River in a southeasterly direction until it strikes the head-waters of[FNI] Big Dry Creek; thence down that creek to where it empties into the Yellowstone River, nearly opposite the mouth of Powder River, and thence down the Yellowstone River to the place of beginning.

The territory of the Blackfoot Nation, commencing at the mouth of Muscle-shell River; thence up the Missouri River to its source; thence along the main range of the Rocky Mountains, in a southerly direction, to the head-waters of the northern source of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence across to the head-waters of the Muscle-shell River, and thence down the Muscle-shell River to the place of beginning.[FNJ]

The territory of the Crow Nation, commencing at the mouth of Powder River on the Yellowstone; thence up

Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the head-waters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek, and thence to its mouth.[FNK]

The territory of the Cheyennes and Arrapahoes, commencing at the Red Bute, or the place where the road leaves the north fork of the Platte River; thence up the north fork of the Platte River to its source; thence along the main range of the Rocky Mountains to the head-waters of the Arkansas River; thence down the Arkansas River to the crossing of the Santa Fe road; thence in a northwesterly direction to the forks of the Platte River, and thence up the Platte River to the place of beginning.[FNL]

It is, however, understood that, in making this recognition and acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.[FNM]

ARTICLE 6

The parties to the second part of this treaty having selected principals or head-chiefs for their respective nations, through whom all national business will hereafter be conducted, do hereby bind themselves to sustain said chiefs and their successors during good behavior.[FNN]

ARTICLE 7

In consideration of the treaty stipulations, and for the damages which have or may occur by reason thereof to the Indian nations, parties hereto, and for their maintenance and the improvement of their moral and social customs, the United States bind themselves to deliver to the said Indian nations the sum of fifty thousand dollars per annum for the term of ten years, with the right to continue the same at the discretion of the President of the United States for a period not exceeding five years thereafter, in provisions, merchandise, domestic animals, and agricultural implements, in such proportions as may be deemed best adapted to their condition by the President of the United States, to be distributed in proportion to the population of the aforesaid Indian nations.[FNO]

ARTICLE 8

It is understood and agreed that should any of the Indian nations, parties to this treaty, violate any of the provisions thereof, the United States may with hold the whole or a portion of the annuities mentioned in the preceding article from the nation so offending, until, in the opinion of the President of the United States, proper satisfaction shall have been made.[FNP]

In testimony whereof the said D. D. Mitchell and Thomas Fitzpatrick commissioners as aforesaid, and the chiefs, headmen, and braves, parties hereto, have set their hands and affixed their marks, on the day and at the place first above written.

D. D. Mitchell
Thomas Fitzpatrick
Commissioners.

Sioux:

Mah-toe-wha-you-whey, his x mark.
Mah-kah-toe-zah-zah, his x mark.
Bel-o-ton-kah-tan-ga, his x mark.
Nah-ka-pah-gi-gi, his x mark.
Meh-wha-tah-ni-hans-kah, his x mark.

Cheyennes:

Wah-ha-nis-satta, his x mark.
Voist-ti-toe-vetz, his x mark.
Nahk-ko-me-ien, his x mark.
Koh-kah-y-wh-cum-est, his x mark.

Arrapahoes:

Be-ah-te-a-qui-sah, his x mark.
Neb-ni-bah-seh-it, his x mark.
Beh-kah-jay-beth-sah-es, his x mark.

Crows:

Arra-tu-ri-sash, his x mark.
Doh-chepit-seh-chi-es, his x mark.

Assinaboines:

Mah-toe-wit-ko, his x mark.
Toe-tah-ki-eh-nan, his x mark.

Mandans and Gros Ventres:

Nochk-pit-shi-toe-pish, his x mark.
She-oh-mant-ho, his x mark.

Arickarees:

Koun-hei-ti-shan, his x mark.
Bi-atch-tah-wetch, his x mark.

In the presence of –

A. B. Chambers, secretary.
S. Cooper, colonel, U.S. Army.
R. H. Chilton, captain, First Drags.

Thomas Duncan, captain, Mounted Riflemen.
Thos. G. Rhett, brevet captain R.M.R .
W. L. Elliott, first lieutenant R.M.R.
C. Campbell, interpreter for Sioux.
John Smith, interpreter for Cheyennes.
Robert Meldrum, interpreter for the Crows.
H. Culbertson, interpreter for Assiniboines and Gros Ventres.
Francois L'Etalie, interpreter for Arickarees.
John Pizelle, interpreter for the Arrapahoes.
B. Gratz Brown.
Robert Campbell.
Edmond F. Chouteau.

FNA This treaty as signed was ratified by the Senate with an amendment changing the annuity in Article 7 from fifty to ten years, subject to acceptance by the tribes. Assent of all tribes except the Crows was procured (see Upper Platte C., 570, 1853, Indian Office) and in subsequent agreements this treaty has been recognized as in force (see post p. 776).

FNB Peace to be observed.

FNC Roads may be established.

FND Indians to be protected.

FNE Depredations on whites to be satisfied.

FNF Boundaries of lands.

FNG Sioux.

FNH Grosventre, etc.

FNI Assiniboin.

FNJ Blackfoot.

FNK Crow.

FNL Cheyenne and Arapaho.

FNM Rights in other lands.

FNN Head chiefs of said tribes.

FNO Annuities.

FNP Annuities suspended by violation of treaty.

1851 WL 4398 (Trty.), 11 Stat 749

11 Stat. 657

TREATY WITH THE BLACKFEET, 1855.

Articles of agreement and convention made and concluded at the council-ground on the Upper Missouri, near the mouth of the Judith River, in the Territory of Nebraska, this seventeenth day of October, in the year one thousand eight hundred and fifty-five, by and between A. Cumming and Isaac I. Stevens, commissioners duly appointed and authorized, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the following nations and tribes of Indians, who occupy, for the purposes of hunting, the territory on the Upper Missouri and Yellowstone Rivers, and who have permanent homes as follows: East of the Rocky Mountains, the Blackfoot Nation, consisting of the Piegan, Blood, Blackfoot, and Gros Ventres tribes of Indians. West of the Rocky Mountains, the Flathead Nation, consisting of the Flathead, Upper Pend d'Oreille, and Kootenay tribes of Indians, and the Nez Perce tribe of Indians, the said chiefs, headmen and delegates, in behalf of and acting for said nations and tribes, and being duly authorized thereto by them.

ARTICLE 1. Peace, friendship and amity shall hereafter exist between the United States and the aforesaid nations and tribes of Indians, parties to this treaty, and the same shall be perpetual.

ARTICLE 2. The aforesaid nations and tribes of Indians, parties to this treaty, do hereby jointly and severally covenant that peaceful relations shall likewise be maintained among themselves in future; and that they will abstain from all hostilities whatsoever against each other, and cultivate mutual good-will and friendship. And the nations and tribes aforesaid do furthermore jointly and severally convenant, that peaceful relations shall be

maintained with and that they will abstain from all hostilities whatsoever, excepting in self-defense, against the following-named nations and tribes of Indians, to wit: the Crows, Assineboins, Crees, Snakes, Blackfeet, Sans Arcs, and Auncepa-pas bands of Sioux, and all other neighboring nations and tribes of Indians.

ARTICLE 3. The Blackfoot Nation consent and agree that all that portion of the country recognized and defined by the treaty of Laramie as Blackfoot territory, lying within lines drawn from the Hell Gate or Medicine Rock Passes in the main range of the Rocky Mountains, in an easterly direction to the nearest source of the Muscle Shell River, thence to the mouth of Twenty-five Yard Creek, thence up the Yellowstone River to its northern source, and thence along the main range of the Rocky Mountains, in a northerly direction, to the point of beginning, shall be a common hunting-ground for ninety-nine years, where all the nations, tribes and bands of Indians, parties to this treaty, may enjoy equal and uninterupted privileges of hunting, fishing and gathering fruit, grazing animals, curing meat and dressing robes. They further agree that they will not establish villages, or in any other way exercise exclusive rights within ten miles of the northern line of the common hunting-ground, and that the parties to this treaty may hunt on said northern boundary line and within ten miles thereof.

Provided, That the western Indians, parties to this treaty, may hunt on the trail leading down the Muscle Shell to the Yellowstone; the Muscle Shell River being the boundary separating the Blackfoot from the Crow territory.

And provided, That no nation, band, or tribe of Indians, parties to this treaty, nor any other Indians, shall be

permitted to establish permanent settlements, or in any other way exercise, during the period above mentioned, exclusive rights or privileges within the limits of the above-described hunting-ground.

And provided further, That the rights of the western Indians to a whole or a part of the common hunting-ground, derived from occupancy and possession, shall not be affected by this article, except so far as said rights may be determined by the treaty of Laramie.

ARTICLE 4. The parties to this treaty agree and consent, that the tract of country lying within lines drawn from the Hell Gate or Medicine Rock Passes, in an easterly direction, to the nearest source of the Muscle Shell River, thence down said river to its mouth, thence down the channel of the Missouri River to the mouth of Milk River, thence due north to the forty-ninth parallel, thence due west on said parallel to the main range of the Rocky Mountains, and thence southerly along said range to the place of beginning, shall be the territory of the Blackfoot Nation, over which said nation shall exercise exclusive control, excepting as may be otherwise provided in this treaty. Subject, however, to the provisions of the third article of this treaty, giving the right to hunt, and prohibiting the establishment of permanent villages and the exercise of any exclusive rights within ten miles of the northern line of the common hunting-ground, drawn from the nearest source of the Muscle Shell River to the Medicine Rock Passes, for the period of ninety-nine years.

Provided also, That the Assiniboins shall have the right of hunting, in common with the Blackfeet, in the country lying between the aforesaid eastern boundary line, running from the mouth of Milk River to the forty-ninth

parallel, and a line drawn from the left bank of the Missouri River, opposite the Round Butte north, to the forty-ninth parallel.

ARTICLE 5. The parties to this treaty, residing west of the main range of the Rocky Mountains, agree and consent that they will not enter the common hunting ground, nor any part of the Blackfoot territory, or return home, by any pass in the main range of the Rocky Mountains to the north of the Hell Gate or Medicine Rock Passes. And they further agree that they will not hunt or otherwise disturb the game, when visiting the Blackfoot territory for trade or social intercourse.

ARTICLE 6. The aforesaid nations and tribes of Indians, parties to this treaty, agree and consent to remain within their own respective countries, except when going to or from, or whilst hunting upon, the "common hunting ground," or when visiting each other for the purpose of trade or social intercourse.

ARTICLE 7. The aforesaid nations and tribes of Indians agree that citizens of the United States may live in and pass unmolested through the countries respectively occupied and claimed by them. And the United States is hereby bound to protect said Indians against depredations and other unlawful acts which white men residing in or passing through their country may commit.

ARTICLE 8. For the purpose of establishing travelling thoroughfares through their country, and the better to enable the President to execute the provisions of this treaty, the aforesaid nations and tribes do hereby consent and agree, that the United States may, within the countries respectively occupied and claimed by them, construct roads of every description; establish lines of telegraph and

military posts; use materials of every description found in the Indian country; build houses for agencies, missions, schools, farms, shops, mills, stations, and for any other purpose for which they may be required, and permanently occupy as much land as may be necessary for the various purposes above enumerated, including the use of wood for fuel and land for grazing, and that the navigation of all lakes and streams shall be forever free to citizens of the United States.

ARTICLE 9. In consideration of the foregoing agreements, stipulations, and cessions, and on condition of their faithful observance, the United States agree to expend, annually, for the Piegan, Blood, Blackfoot, and Gros Ventres tribes of Indians, constituting the Blackfoot Nation, in addition to the goods and provisions distributed at the time of signing the treaty, twenty thousand dollars, annually, for ten years, to be expended in such useful goods and provisions, and other articles, as the President, at his discretion, may from time to time determine; and the superintendent, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto: *Provided, however*, That if, in the judgment of the President and Senate, this amount be deemed insufficient, it may be increased not to exceed the sum of thirty-five thousand dollars per year.

ARTICLE 10. The United States further agree to expend annually, for the benefit of the aforesaid tribes of the Blackfoot Nation, a sum not exceeding fifteen thousand dollars annually, for ten years, in establishing and instructing them in agricultural and mechanical pursuits, and in educating their children, and in any other respect promoting their civilization and Christianization: Provided, however, That to accomplish the objects of this

article, the President may, at his discretion, apply any or all the annuities provided for in this treaty: *And provided, also*, That the President may, at his discretion, determine in what proportions the said annuities shall be divided among the several tribes.

ARTICLE 11. The aforesaid tribes acknowledge their dependence on the Government of the United States, and promise to be friendly with all citizens thereof, and to commit no depredations or other violence upon such citizens. And should any one or more violate this pledge, and the fact be proved to the satisfaction of the President, the property taken shall be returned, or, in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities. The aforesaid tribes are hereby bound to deliver such offenders to the proper authorities for trial and punishment, and are held responsible, in their tribal capacity, to make reparation for depredations so committed.

Nor will they make war upon any other tribes, except in self-defense, but will submit all matter of difference, between themselves and other Indians, to the Government of the United States, through its agents, for adjustment, and will abide thereby. And if any of the said Indians, parties to this treaty, commit depredations on any other Indians within the jurisdiction of the United States, the same rule shall prevail as that prescribed in this article in case of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE 12. It is agreed and understood, by and between the parties to this treaty, that if any nation or

tribe of Indians aforesaid, shall violate any of the agreements, obligations, or stipulations, herein contained, the United States may withhold, for such length of time as the President and Congress may determine, any portion or all of the annuities agreed to be paid to said nation or tribe under the ninth and tenth articles of this treaty.

ARTICLE 13. The nations and tribes of Indians, parties to this treaty, desire to exclude from their country the use of ardent spirits or other intoxicating liquor, and to prevent their people from drinking the same. Therefore it is provided, that any Indian belonging to said tribes who is guilty of bringing such liquor into the Indian country, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her, for such time as the President may determine.

ARTICLE 14. The aforesaid nations and tribes of Indians, west of the Rocky Mountains, parties to this treaty, do agree, in consideration of the provisions already made for them in existing treaties, to accept the guarantees of the peaceful occupation of their hunting-grounds, east of the Rocky Mountains, and of remuneration for depredations made by the other tribes, pledged to be secured to them in this treaty out of the annuities of said tribes, in full compensation for the concessions which they, in common with the said tribes, have made in this treaty.

The Indians east of the mountains, parties to this treaty, likewise recognize and accept the guarantees of this treaty, in full compensation for the injuries or depredations which have been, or may be committed by the aforesaid tribes, west of the Rocky Mountains.

ARTICLE 15. The annuities of the aforesaid tribes shall not be taken to pay the debts of individuals.

ARTICLE 16. This treaty shall be obligatory upon the aforesaid nations and tribes of Indians, parties hereto, from the date hereof, and upon the United States as soon as the same shall be ratified by the President and Senate.

In testimony whereof the said A. Cumming and Isaac I. Stevens, commissioners on the part of the United States, and the undersigned chiefs, headmen, and delegates of the aforesaid nations and tribes of Indians, parties to this treaty, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

A. Cumming. [L.S.]
Isaac I. Stevens. [L.S.]

Piegans:

Nee-ti-nee, or "the only chief," now called the Lame Bull, his x mark. [L.S.]
Mountain Chief, his x mark. [L.S.]
Low Horn, his x mark. [L.S.]
Little Gray Head, his x mark. [L.S.]
Little Dog, his x mark. [L.S.]
Big Snake, his x mark. [L.S.]
The Skunk, his x mark. [L.S.]
The Bad Head, his x mark. [L.S.]
Kitch-eepone-istah, his x mark. [L.S.]
Middle Sitter, his x mark. [L.S.]

Bloods:

Onis-tay-say-nah-que-im, his x mark. [L.S.]
The Father of All Children, his x mark. [L.S.]
The Bull's Back Fat, his x mark. [L.S.]
Heavy Shield, his x mark. [L.S.]
Nah-tose-onistah, his x mark. [L.S.]
The Calf Shirt, his x mark. [L.S.]

Gros Ventres:

Bear's Shirt, his x mark. [L.S.]
Little Soldier, his x mark. [L.S.]

Star Robe, his x mark. [L.S.]
Sitting Squaw, his x mark. [L.S.]
Weasel Horse, his x mark. [L.S.]
The Rider, his x mark. [L.S.]
Eagle Chief, his x mark. [L.S.]
Heap of Bears, his x mark. [L.S.]

Blackfeet:

The Three Bulls, his x mark. [L.S.]
The Old Kootomais, his x mark. [L.S.]
Pow-ah-que, his x mark. [L.S.]
Chief Rabbit Runner, his x mark. [L.S.]

Nez Perces:

Spotted Eagle, his x mark. [L.S.]
Looking Glass, his x mark. [L.S.]
The Three Feathers, his x mark. [L.S.]
Eagle from the Light, his x mark. [L.S.]
The Lone Bird, his x mark. [L.S.]
Ip-shun-nee-wus, his x mark. [L.S.]
Jason, his x mark. [L.S.]
Wat-ti-wat-ti-we-hinck, his x mark. [L.S.]
White Bird, his x mark. [L.S.]
Stabbing Man, his x mark. [L.S.]
Jesse, his x mark. [L.S.]
Plenty Bears, his x mark. [L.S.]

Flathead Nation:

Victor, his x mark. [L.S.]
Alexander, his x mark. [L.S.]
Moses, his x mark. [L.S.]
Big Canoe, his x mark. [L.S.]
Ambrose, his x mark. [L.S.]
Kootle-cha, his x mark. [L.S.]
Michelle, his x mark. [L.S.]
Francis, his x mark. [L.S.]
Vincent, his x mark. [L.S.]
Andrew, his x mark. [L.S.]
Adolphe, his x mark. [L.S.]
Thunder, his x mark. [L.S.]

Piegans:

Running Rabbit, his x mark. [L.S.]
Chief Bear, his x mark. [L.S.]
The Little White Buffalo, his x mark. [L.S.]
The Big Straw, his x mark. [L.S.]

Flathead:

Bear Track, his x mark. [L.S.]
Little Michelle, his x mark. [L.S.]
Palchinah, his x mark. [L.S.]

Bloods:

The Feather, his x mark. [L.S.]
The White Eagle, his x mark. [L.S.]

* * *

FIFTIETH CONGRESS. SESS. I. CH. 213, 1888.

CHAP. 213. – An act to ratify and confirm an agreement with the Gros Ventre, Piegan, Blood; Blackfeet, and River Crow Indians in Montana, and for other purposes:

Whereas, John V. Wright, Jared W. Daniels, and Charles F. Larabee, duly appointed commissioners on the part of the United States, did, on the twenty-eighth and thirty-first days of December, anno Domini eighteen hundred and eighty-six, and the twenty-first day of January, anno Domini eighteen hundred and eighty-seven, conclude an agreement with the various tribes or bands of Indians residing upon the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Reservation in Montana Territory, by their chiefs, head-men, and principal men, embracing a majority of all the male adult Indians occupying said reservation, which said agreement is as follows:

Agreement concluded December twenty-eighth and thirty-first, eighteen hundred and eighty-six, and January twenty-first, eighteen hundred and eighty-seven; with the Indians of the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Reservation in Montana, by John V. Wright, Jared W. Daniels, and Charles F. Larabee, Commissioners.

This agreement, made pursuant to an item in the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-seven, and for other purposes," approved May fifteenth eighteen hundred and eighty-six, by John V. Wright, Jared W. Daniels, and Charles F. Larabee, duly appointed commissioners on the part of the United States, and the

various tribes or bands of Indians residing upon the Gros Ventre, Piegan, Blood, Blackfoot, and River Crow Reservation, in the Territory of Montana, by their chiefs, head-men, and principal men, embracing a majority of all the male adult Indians occupying said reservation, witnesseth that –

Whereas the reservation set apart by act of Congress approved April fifteenth, eighteen hundred and seventy-four, for the use and occupancy of the Gros Ventre, Piegan, Blood, Blackfoot, River Crow, and such other Indians as the President might, from time to time, see fit to locate thereon, is wholly out of proportion to the number of Indians occupying the same, and greatly in excess of their present or prospective wants; and whereas the said Indians are desirous of disposing of so much thereof as they do not require, in order to obtain the means to enable them to become self-supporting, as a pastoral and agricultural people, and to educate their children in the paths of civilization: Therefore, to carry out such purpose, it is hereby agreed as follows:

ARTICLE I.

Hereafter the permanent homes of the various tribes or bands of said Indians shall be upon the separate reservations hereinafter described and set apart. Said Indians acknowledging the rights of the various tribes or bands, at each of the existing agencies within their present reservation, to determine for themselves, with the United States, the boundaries of their separate reservation, hereby agree to accept and abide by such agreements and conditions as to the location and boundaries of such separate reservation as may be

made and agreed upon by the United States and the tribes or bands for which such separate reservation may be made, and as the said separate boundaries may be hereinafter set forth.

ARTICLE II.

The said Indians hereby cede and relinquish to the United States all their right, title, and interest in and to all the lands embraced within the aforesaid Gros Ventre, Piegan, Blood, Blackfoot, and River Crow Reservation, not herein specifically set apart and reserved as separate reservations for them, and do severally agree to accept and occupy the separate reservations to which they are herein assigned as their permanent homes, and they do hereby severally relinquish to the other tribes or bands respectively occupying the other separate reservations, all their right, title, and interest in and to the same, reserving to themselves only the reservation herein set apart for their separate use and occupation.

ARTICLE III.

In consideration of the foregoing cession and relinquishment the United States hereby agrees to advance and expend annually, for the period of ten years after the ratification of this agreement, under direction of the Secretary of the Interior, for the Indians now attached to and receiving rations at the Fort Peck Agency, one hundred and sixty-five thousand dollars; for the Indians now attached to and receiving rations at the Fort Belknap Agency, one hundred and fifteen thousand dollars, and for the Indians now attached to and receiving rations at the Blackfeet Agency, one

hundred and fifty thousand dollars, in the purchase of cows, bulls, and other stock, goods, clothing, subsistence, agricultural and mechanical implements, in providing employees, in the education of Indian children, procuring medicine and medical attendance, in the care and support of the aged, sick, and infirm, and helpless orphans of said Indians, in the erection of such new agency and school buildings, mills, and blacksmith, carpenter, and wagon shops as may be necessary, in assisting the Indians to build houses and inclose their farms, and in any other respect to promote their civilization, comfort, and improvement: *Provided,* That in the employment of farmers artisans, and laborers, preference shall in all cases be given to Indians residing on the reservation who are well qualified for such position: *Provided further,* That all cattle issued to said Indians for stock-raising purposes, and their progeny, shall bear the brand of the Indian Department, and shall not be sold, exchanged, or slaughtered, except by consent or order of the agent in charge, until such time as this restriction shall be removed by the Commissioner of Indian Affairs.

ARTICLE IV.

It is further agreed that whenever in the opinion of the President the annual installments provided for in the foregoing article shall be found to be in excess of the amount required to be expended in any one year in carrying out the provisions of this agreement upon either of the separate reservations, so much thereof, as may be in excess of the requirement shall be placed to the credit of the Indians of such reservation, in the Treasury of the United States, and expended in

continuing the benefits herein provided for when said annual installments shall have expired.

ARTICLE V.

In order to encourage habits of industry, and reward labor, it is further understood and agreed, that in the giving out or distribution of cattle or other stock, goods, clothing, subsistence, and agricultural implements, as provided for in Article III, preference shall be given to Indians who endeavor by honest labor to support themselves, and especially to those who in good faith undertake the cultivation of the soil, or engage in pastoral pursuits, as a means of obtaining a livelihood, and the distribution of these benefits shall be made from time to time, as shall best promote the objects specified.

ARTICLE VI.

It is further agreed that any Indian belonging to either of the tribes or bands, parties hereto, who had, at the date of the execution of this agreement by the tribe or band to which he belongs, settled upon and made valuable improvements upon any of the lands ceded to the United States under the provisions of this agreement, shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantity as follows: To the head of the family, one hundred and sixty acres; to each child over eighteen years of age, eighty acres; to each child under eighteen years of age, forty acres; and the grant to such Indians shall be adjusted upon the survey of the lands so

as to conform thereto. Upon the approval of said allotments by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the lands thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the Territory of Montana, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of said lands, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That the laws of descent and partition in force in said Territory shall apply thereto after patents therefor have been executed and delivered: *Provided, further,* That any such Indian shall be entitled to his distributive share of all the benefits to be derived from the cession of lands to the United States under this agreement, the same as though he resided within the limits of the diminished reservation to which he would properly belong.

ARTICLE VII.

The outboundaries of the separate reservations, or such portions thereof as are not defined by natural objects, shall be surveyed and marked in a plain and substantial manner, the cost of such surveys to be paid out of the first annual installments provided for in Article III of this agreement.

ARTICLE VIII.

It is further agreed that, whenever in the opinion of the President the public interests require the construction of railroads, or other highways, or telegraph lines, through any portion of either of the separate reservations established and set apart under the provisions of this agreement, right of way shall be, and is hereby, granted for such purposes, under such rules, regulations, limitations, and restrictions as the Secretary of the Interior may prescribe; the compensation to be fixed by said Secretary and by him expended for the benefit of the Indians concerned.

ARTICLE IX.

This agreement shall not be binding upon either party until ratified by Congress.

Dated and signed at Fort Peck Agency, Montana, on the twenty-eighth day of December, eighteen hundred and eighty-six.

JNO. V. WRIGHT, [SEAL.]
JARED W. DANIELS, [SEAL.]
CHAS. F. LARRABEE, [SEAL.]

Commissioners.

It is hereby agreed that the separate reservation for the Indians now attached to and receiving rations at the Fort Peck Agency, Montana, shall be bounded as follows, to wit:

Beginning at a point in the middle of the main channel of the Missouri River, opposite the mouth of Big Muddy Creek; thence up the Missouri River, in the middle of the main channel thereof, to a point opposite the mouth of Milk River; thence up

the middle of the main channel of Milk River to Porcupine Creek; thence up Porcupine Creek, in the middle of the main channel thereof, to a point forty miles due north in a direct line from the middle of the main channel of the Missouri River opposite the mouth of Milk River; thence due east to the middle of the main channel of Big Muddy Creek; thence down said creek, is the middle of the main channel thereof, to the place of beginning. And said Indians shall have the right to take timber for building and fencing purposes and for fuel from the bottom lands on the right bank of the Missouri River opposite the reservation above described.

Dated and signed at Fort Peck Agency, Montana, on the twenty-eighth day of December, eighteen hundred and eighty-six.

JNO. V. WRIGHT, [SEAL.]
JARED W. DANIELS, [SEAL.]
CHAS. F. LARRABEE, [SEAL.]

Commissioners.

The foregoing articles of agreement having been fully explained to us, in open council, we, the undersigned chiefs, headmen, and principal men of the several bands of Sioux and Assinnaboine Indians attached to and receiving rations at the Fort Peck Agency, in the Territory of Montana, do hereby consent and agree to all the stipulations therein contained.

Witness our hands and seals at Fort Peck Agency, Montana this twenty-eighth day of December, eighteen hundred and eighty-six.

SIOUX.

Mat-to-wa-kan, Medicine Bear, his x mark. Seal.

Wam-a-de-ze, Yellow Eagle, his x mark. Seal.

Tach-ah-sin-tag, Deer Tail, his x mark. Seal.

Chah-dah-sa-pah, Black Hawk, his x mark. Seal.

Wam-a-de-ton-kah, Big Eagle, his x mark. Seal.

Wa-da-lu-cha-chi-conna, White Maggot, his x mark. Seal.

Mo-to-co-ke-pa, Afraid of Bear, his x mark. Seal.

Te-pec-sha, Red Lodge, his x mark. Seal.

Wa-ge-ah-du-ta, Red Thunder, his x mark. Seal.

* * *

Acadmmoh, Man Takes Plenty Arms, his x mark. Seal.

Echo Ka-mix, Man holds Pipe, his x mark. Seal.

Kut-ta-nah, Top Chief, his x mark. Seal.

Skikenna Kema, Pities People, his x mark. Seal.

She-pe-na-muk, Night Guman, his x mark. Seal.

Pena-tuya-a-muk, Running Fisher, his x mark. Seal.

A-cokeya, Plenty Bears, his x mark. Seal.

Ma-que-a-koopah, Wolf Child, his x mark. Seal.

Oke Shema, Mean Drinker, his x mark. Seal.

Meko-kim-namoke, Iron Gun Taer, his x mark. Seal.

Attest:

M. D. BALDWIN,
United States Indian Agent.

C. B. TOOLE,
Agency Clerk.

JOHN P. WAGNER,
Assistant Agency Clerk.

We hereby certify that the foregoing articles of agreement were carefully read and explained to the Indians above named, in open council, and were thoroughly understood by them, before signing the same, and that the agreement was executed and signed by said Indians, at the Blackfeet Agency, in the Territory of Montana, on the eleventh day of February, eighteen hundred and eighty-seven.

WILL RUSSELL,
United States Interpreter.

JOSEPH KIPP,
Special Interpreter.

Attest:

EUGENE MEAD.
JOHN JORDEN.

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreement be, and the same is hereby, accepted, ratified, and confirmed.

SEC. 2. That for the purpose of carrying out the terms of said agreement the sum of four hundred and thirty thousand dollars is hereby appropriated, to be immediately available.

SEC. 3. That lands to which the right of the Indians is extinguished under the foregoing agreement are a part of the public domain of the United States and are open to the operation of the laws regulating homestead entry, except section twenty-three hundred and one of the Revised Statutes, and to entry under the town site laws and the laws governing the disposal of coal lands, desert lands, and mineral lands; but are not open to entry under any other laws regulating the sale or disposal of the public domain.

SEC. 4. The Secretary of the Interior is hereby authorized to appoint a commission, consisting of three persons, with authority to negotiate with the band of Ute Indians of southern Colorado for such modification of their treaty and other rights, and such exchange of their reservation, as maybe deemed desirable by said Indians and the Secretary of the Interior; and said commission is also authorized, if the result of such negotiations shall make it necessary, to negotiate with any other tribes of Indians for such portion of their reservation as may be necessary for said band of Ute Indians of southern Colorado if said Indians shall determine to remove from their present location; the report of said commission to be made to and subject to ratification by Congress before taking effect; and for this purpose the sum of ten thousand dollars, or so much thereof as may be necessary, is hereby appropriated, which shall be immediately available.

Approved, May 1, 1888.

* * *

FIFTY-FOURTH CONGRESS. SESS. I. CH. 398, 1896.

AGREEMENT WITH THE INDIANS OF THE FORT BELKNAP INDIAN RESERVATION IN MONTANA.

SEC. 8. Whereas William C. Pollock, George Bird Grinnell, and Walter M. Clements, commissioners on the part of the United States, did on the ninth day of October, anno Domini eighteen hundred and ninety-five, conclude an agreement with the Indians of the Fort Belknap Reservation in the State of Montana, which said agreement is in words and figures as follows (Senate Document Numbered One hundred and seventeen, Fifty-fourth Congress, first session), to wit:

Agreement concluded October ninth, eighteen hundred and ninety-five, with the Indians of the Fort Belknap Reservation in Montana, by William C. Pollock, George Bird Grinnell, and Walter M. Clements, commissioners.

This agreement, made and entered into this ninth day of October, anno Domini eighteen hundred and ninety-five, by and between William C. Pollock, George Bird Grinnell, and Walter M. Clements, commissioners on the part of the United States, and the undersigned Indians, residing upon and attached to the Fort Belknap Indian Reservation in the State of Montana, the same constituting a majority of the male adult Indians belonging upon said reservation, witnesseth that,

ARTICLE I.

For and in consideration of the sum to be paid and the obligations assumed on the part of the United States, as hereinafter set forth, said Indians of the Fort Belknap Reservation hereby convey, relinquish, and release to the

United States all their right, title, and interest in and to that portion of their present reservation, in the State of Montana, lying and being within the following-described lines, to wit: Beginning at the 54-mile boundary monument, at a point about the middle of the crest of Mission Butte, and following a straight line, bearing (magnetic) north 17 degrees 30 minutes west, to the highest point on a limestone ridge on the south side of the north fork of People's Creek, and running at right angles to the course of said creek at this point; thence in a straight line, bearing (magnetic) north 2 degrees 45 minutes west, to a rounded, timbered knob on the crest of the limestone reef on the, north side of the north fork of People's Creek, and parallel with its general course; thence easterly, following the crest of the last-mentioned limestone reef north of the north fork of People's Creek, to a low rounded hill on said limestone reef, where it dips down to the valley of Lodge Pole, or Red Mountain Creek; thence in a straight line, north 74 degrees east magnetic) to the wooded limestone ridge known as Travois Butte, were a line drawn from the summit of Granite Butte (the peak south of the 61½ mile boundary monument) north 15 degrees east (magnetic) would intersect it; thence along said straight line to the southern boundary line of the present reservation; thence along said southern boundary line of the present reservation to the point of beginning.

ARTICLE II.

For and in consideration of the conveyance, cession, and relinquishment hereinbefore made, the United States hereby covenants and agrees to advance and expend during the period of four years, beginning from and after the expiration of the payments provided for in the agreement

made between the parties hereto on the eleventh day of February, A. D. eighteen hundred and eighty-seven, and ratified by Congress on the first day of May, A. D. eighteen hundred and eighty-eight, under the direction of the Secretary of the Interior for the Indians, the sum of three hundred and sixty thousand dollars. It is agreed that the said money shall be deposited in the Treasury of the United States immediately upon the expiration of the payments under the said agreement of 1887, to bear interest at the rate of four per centum per annum, and there shall be expended the sum of ninety thousand dollars yearly, or so much thereof as may be necessary, as hereinafter provided. It is provided that any surplus accumulated under and remaining at the expiration of payments under the agreement of 1887 shall also bear interest at the rate of four per centum per annum.

Such sums, or so much thereof as may be necessary in any one year, shall be expended in the purchase of cows, bulls, and other live stock, goods, clothing, subsistence, agricultural implements; in providing employees, in the education of Indian children, in procuring medicine and medical attendance, in the care and support of the aged, sick, and infirm, and helpless orphans; in the erection and keeping in repair of such new agency and school buildings, mills, blacksmith, carpenter and wagon shops, as may be necessary; in assisting the Indians to build and keep in repair their houses, enclose and irrigate their farms, and in such other ways as may best promote their civilization and improvement.

ARTICLE III.

It is agreed that in the employment of all agency and school employees preference in all cases be given to Indians residing on the reservation, who are well qualified for such positions, and that all cattle issued to said Indians for stock-raising purposes, and their progeny, shall bear the brand of the Indian Department, and shall not be sold, exchanged, or slaughtered except by the consent of the agent in charge, until such time as this restriction shall be removed by the Commissioner of Indian Affairs.

ARTICLE IV.

In order to encourage habits of industry and to reward labor it is further understood and agreed that in the giving out or distribution of cattle or other stock, goods, clothing, subsistence, and agricultural implements, as provided in Article II, preference shall be given to Indians who endeavor by honest labor to support themselves, and especially to those who in good faith undertake the cultivation of the soil and engage in pastoral pursuits as a means of obtaining a livelihood, and the distribution of these benefits shall be made from time to time in such manner as shall best promote the objects specified.

ARTICLE V.

As the scarcity of water on this reservation renders the pursuit of agriculture difficult and uncertain, and since the reservation is well adapted to stock raising, and it seems probable that the main reliance of these Indians for self-support is to be found in cattle raising, it is agreed that during the existence of this agreement no allotments of land in severalty shall be made to them, but that this

whole reservation shall continue to be held by these Indians as a communal grazing tract, upon which their herds may feed undisturbed; and that after the expiration of this agreement the land shall continue to be so held until such time as a majority of the adult males of the tribes shall request in writing that allotment in severalty shall be made of their lands: *Provided,* That any member of the tribes may, with the approval of the agent in charge, fence in such area of land as he and the members of his family would be entitled to under the allotment act, and may file with the agent a description of such land and of the improvements that he has made on the same, and the filing of such description shall give the said member of the tribes the right to take such land when allotments of the lands in severalty shall be made.

ARTICLE VI.

So soon as this agreement shall have received the approval of Congress, the boundary lines described in Article I shall be surveyed, designated, and marked by monuments not more than one-half mile apart. The expense of such survey shall be borne by the United States, but the unskilled laborers employed in the work shall be hired from among the Indians residing on this reservation.

Such survey and the markings of the above-described boundary lines shall be done immediately – not later than ninety days after the approval of this agreement by Congress – and completed as speedily as possible, and the ceded portion of the reservation shall not be thrown open to occupancy by the whites until after the new boundaries of the reservation shall have been established and marked.

ARTICLE VII.

It is further agreed and provided that none of the money realized from the sale of this land shall be applied to the payment of any judgment which has been or may hereafter be rendered upon any claim for damages because of depredations committed by said Indians prior to the date of this agreement.

ARTICLE VIII.

All of the provisions of the agreement between the parties hereto, made February 11, 1887, not in conflict with the provisions of this agreement, are hereby continued in full force and effect.

ARTICLE IX.

It is understood and declared that whenever the word Indian is used in this agreement it includes mixed bloods as well as full bloods.

ARTICLE X.

This agreement shall not be binding upon either party until ratified by Congress.

Dated and signed at the Fort Belknap Agency, Montana, on the ninth day of October, 1895.

[SEAL.] WILLIAM C. POLLOCK.
[SEAL.] GEO. BIRD GRINNELL.

Houga Dju shi na, his x mark, (LITTLE CHIEF) and others.

FORT BELKNAP AGENCY, MONT., October 9, 1895.

We, James Matt, Charles Buckman, Chas. Perry, and James Perry, do certify that the annexed and foregoing agreement by and between the United States and Indians residing upon and attached to the Fort Belknap Indian Reservation in Montana was fully interpreted to said Indians and they made to understand the same; that after said interpretation the said Indians, whose flames appear subscribed to said agreement, signed the same in our presence.

We further certify that said Indians are members of said tribes and reside upon said reservation, set apart for said Indians in Montana, and that said subscribers are male adults over the age of 21 years.

Given under our hand at the Fort Belknap Agency this 9th day of October, 1895

CHARLES PERRY.
CHARLIE BUCKMAN.
JAMES MATT.
JAMES PERRY.

FORT BELKNAP AGENCY, MONT., October 9, 1895.

I hereby certify that there are 181 male adult Assiniboine and 153 male adult Gros Ventre Indians, making a total of 334 male adult Indians residing on this reservation and drawing rations and annuities at this agency, as shown by the records of the agency office.

LUKE C. HAYS,
United States Indian Agent.

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreement be, and the same is hereby, accepted, ratified, and confirmed.

That for the purpose of making the survey of the boundary lines described in article one as provided for by article six of said agreement, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one thousand five hundred dollars, or so much thereof as may be necessary, the same to be immediately available.

That upon the filing in the United States local land office for the district in which the lands surrendered by article one of the foregoing agreement are situated, of the approved plat of survey authorized by this section, the lands so surrendered shall be open to occupation, location, and purchase, under the provisions of the mineral-land laws only, subject to the several articles of the foregoing agreement: *Provided,* That said lands shall be sold at ten dollars per acre: *And provided further,* That the terms of this section shall not be construed to authorize the occupancy of said lands for mining purposes prior to the date of filing said approved plat of survey: *Provided, however,* That any person who in good faith prior to the passage of this Act had discovered and opened, or located, a mine of coal or other mineral, shall have a preference right of purchase for ninety days from and after the official filing in the local land office of the approved plat of survey provided for by this section.

AGREEMENT WITH THE INDIANS OF THE BLACKFEET INDIAN RESERVATION IN MONTANA.

SEC. 9. Whereas William C. Pollock, George Bird Grinnell, and Walter M. Clements, commissioners on the part of the United States, did on the twenty-sixth day of September, anno Domini eighteen hundred and ninety-five, conclude an agreement with the Indians of the Blackfeet Reservation, in the State of Montana, which said agreement is in words and figures as follows (Senate Document Numbered One hundred and eighteen, Fifty-fourth Congress, first session), to wit:

Agreement concluded September twenty-sixth, eighteen hundred and ninety-five, with the Indians of the Blackfeet Reservation, in Montana, by William C. Pollock, George Bird Grinnell, and Walter M. Clements, commissioners.

This agreement, made and entered into the twenty-sixth day of September, anno Domini eighteen hundred and ninety-five, by and between William C. Pollock, George Bird Grinnell, and Walter M. Clements, commissioners on the part of the United States, and the undersigned Indians, both full bloods and mixed bloods, residing upon and attached to the Blackfeet Indian Reservation, in the State of Montana, the same constituting a majority of the male adult Indians belonging upon said reservation, both full bloods and mixed bloods, the latter's rights to

* * *

54TH CONGRESS } SENATE. { DOCUMENT
1st Session. } { No. 117.

IN THE SENATE OF THE UNITED STATES.

February 12, 1896. – Referred to the Committee on Indian Affairs and ordered to be printed.

THE LETTER FROM THE SECRETARY OF THE INTERIOR, TRANSMITTING AN AGREEMENT MADE AND CONCLUDED OCTOBER 9, 1895, WITH THE INDIANS OF THE FORT BELKNAP RESERVATION, IN MONTANA, BY WILLIAM C. POLLOCK, GEORGE BIRD GRINNELL, AND WALTER M. CLEMENTS, COMMISSIONERS APPOINTED UNDER THE PROVISIONS OF THE ACT OF MARCH 2, 1895.

DEPARTMENT OF THE INTERIOR,
Washington, February 12, 1896.

SIR: I have the honor to transmit herewith an agreement made and concluded October 9, 1895, with the Indians of the Fort Belknap Reservation, in Montana, by William C. Pollock, George Bird Grinnell, and Walter M. Clements, commissioners appointed under the provisions of the act of March 2, 1895 (28 Stat. L., 900).

I also transmit the report of the commission, the proceedings of councils held with the Indians, the report of Mr. Walter H. Weed, the geologist, on the mineral resources of the lands ceded, together with draft of a bill prepared by the Commissioner of Indian Affairs and the Commissioner of the General Land Office to ratify the said agreement as shown by their accompanying letters.

It appears from the statements made in these papers that the price fixed for these lands will reimburse to the United States the amount agreed to be paid the Indians, and because of this the matter is presented for the favorable action of Congress.

Very respectfully,

HOKE SMITH, *Secretary*

THE PRESIDENT OF THE SENATE.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, January 11, 1896.

SIR: By a clause in the last Indian appropriation act (28 Stat. L., 900) provision was made for negotiations with the Indians of the Blackfeet and Fort Belknap reservations, in the State of Montana, for the surrender of certain portions of their respective reservations, as follows:

To enable the Secretary of the Interior, in his discretion, to negotiate with the Belknap Indians for the surrender of certain portions of their reservation, situated in the north central portion of the State of Montana, and the Blackfeet Indians for be surrender of certain portions of their reservation, situated in the northwestern part of the State of Montana, three thousand five hundred dollars; and the Secretary of the Interior is hereby authorized to appoint a commission to negotiate with the said Belknap and Blackfeet Indians for the ceding of said portions of their respective reservations, any agreement thus negotiated being subject to action by Congress.

Under and in pursuance of this provision the Secretary appointed a commission, consisting of William C. Pollock, George Bird Grinnell, and Walter M. Clements, to conduct the negotiations provided for with the Indians mentioned, and instructions for their guidance were prepared in this office and submitted with my report of August 19, 1895, for your approval. They were approved by you on August 21, 1895, and returned to this office, and on the same date they were sent to the commissioners.

I am now in receipt of a report, of December 14, 1895, from Messrs. Pollock and Grinnell, transmitting an agreement reached by them with the Indians of the Fort Belknap Reservation, Mr. Clements having on account of ill health been compelled to return to his home before the negotiations with these Indians had been concluded, of which fact the Department was advised by me in a report of October 15, 1895.

The object of the negotiations with the Indians mentioned in the law was to secure the cession by them of the mountainous portions of their respective reservations supposed to contain valuable deposits of gold, silver, and copper. The agreement with the Fort Belknap Indians was concluded on October 9, 1895.

By article 1 thereof the Indians cede a portion of the Fort Belknap Reservation on the south, which is described principally by natural boundaries and bearings to natural points, and embraces the section supposed to contain valuable mineral deposits, and is in extent about 40,000 acres of land.

By article 2 the United States agrees, in consideration for the cession contained in article 1, to pay to the Indians the sum of $360,000, to be deposited in the Treasury and

draw interest at the rate of 4 per cent per annum immediately upon the expiration of the payments provided for by article 3 of the agreement with said Indians, which was ratified by the act of May 1, 1888 (25 Stat. L., 113), $90,000, or so much thereof as may be necessary, to be expended annually in the "purchase of cows, bulls, and other live stock, goods, clothing, subsistence, agricultural implements, in providing employees, in the education of Indian children, in procuring medicine and medical attendance, in the care and support of the aged, sick, and infirm, and helpless orphans, in the erection and keeping in repair of such new agency and school buildings, mills, blacksmith, carpenter, and wagon shops as may be necessary, in assisting the Indians to build and keep in repair their houses, inclose and irrigate their farms, and in such other ways as may best promote their civilization and improvement."

It is also provided in said article that any surplus accumulated under and remaining at the expiration of payments provided for in the agreement of 1877 shall also bear interest at the rate of 4 per cent per annum, and be subject to expenditure for the purposes above stated, as in the case of the sum of $360,000.

Article 3 provides that Indians who are qualified shall be given preference in the employment of agency and school employees, and that all cattle issued to the Indians for stock-raising purposes and their progeny shall bear the brand of the Indian Department, and not be sold, exchanged, or slaughtered except with the consent of the agent in charge, but the Commissioner of Indian Affairs may remove this restriction.

Article 4 provides, in order to encourage habits of industry and to reward labor, that in the giving out or distribution of cattle or other stock, goods, clothing, subsistence, and agricultural implements, preference shall be given to Indians who endeavor by honest labor to support themselves and especially those who in good faith undertake the cultivation of the soil and engage in pastoral pursuits.

Article 5 recites that the scarcity of water on the reservation renders the pursuit of agriculture difficult and uncertain, and that the reservation is well adapted to stock raising; and provides that during the existence of the agreement no allotments of land in severalty shall be made, but that the reservation shall continue to be held by the Indians as a communal grazing tract upon which their herds may feed undisturbed; and that after the expiration of the agreement the reservation shall continue to be so held until such time as a majority of the adult males of the tribes shall request in writing that allotment in severalty shall be made of their lands. It further provides that any member of the tribe may, with the approval of the agent in charge, fence in such area of land as he and the members of his family would be entitled to under the allotment act, and may file with the agent a description of such land and of the improvements that he has made on the same, and that the filing of such description shall give him the right to take such land when allotments of the lands in severalty shall be made.

Article 6 provides for the survey of the boundary line described in article 1 immediately after the ratification of the agreement by Congress, such survey to begin not later than ninety days after such ratification.

Article 7 provides that none of the money realized under this agreement shall be used to pay any claim for damages because of depredations committed by the Indians prior to the date of the agreement.

Article 8 continues in force all the provisions of the agreement of 1887 not in conflict with this agreement.

By article 9 "it is understood and declared that wherever the word Indian is used in this agreement it includes mixed bloods as well as full bloods."

Article 10 provides that the agreement shall not be binding upon either party until ratified by Congress.

In their instructions the commissioners were advised that the objects in making the crest of the Little Rocky Mountain range the southern boundary of the Fort Belknap Reservation by the agreement of 1887 were, that the Indians could have the benefit of the timber and building stone abounding in the mountains, and which would be greatly needed by them in building houses and otherwise improving their homes; and also that the Indian Department should have the control of the waters of the streams having their sources in the mountains for much-needed irrigation and for domestic uses by the Indians. They were instructed that these matters should receive their careful consideration in order that no irreparable damage might be done the Indians by depriving them of these important benefits, which might be vital to their very existence; that they could, by a thorough study of the situation, determine how best to protect the Indians in the continued enjoyment of the natural resources of their reservation, and so arrange the boundaries of any portion of their reservation that the Indians might be willing to

cede, as to retain a sufficient area of timber and stone-bearing lands to meet their future wants.

By an examination of the records of the proceedings of the councils held by the commissioners with the Fort Belknap Indians it will be observed that the Indians were assured by the commissioners that they would not be giving up any of their timber or grass lands by a cession of the tract described in the agreement, and that they would have ample water for all their needs. The ceded tract is described in a report by geologist Walter H. Weed as the "central porphyry region, including the highest peaks and head-water gulches of the streams." In another part of his report he describes this porphyry region as being "covered with scrubby pines and brush, none of which is useful for timber."

These remarks by the commissioners at the councils and what Mr. Weed says in his report as above set forth relative to the character of the ceded lands are all that is contained in the papers accompanying the agreement from which to determine whether the Indians have retained sufficient water and timber and stone bearing lands for their future needs; but Mr. Pollock, the chairman of the commission, assures me informally that the water rights of the Indians will not be in any way impaired by the cession, and that they have retained enough wood and water for their uses for all time. I am therefore satisfied that in making this agreement these vital interests of the Indians have received the due consideration of the commissioners and have been preserved intact.

The tract ceded contains, according to the report of the commission, something over 40,000 acres of land. The

consideration agreed on is $360,000 or about $9 per acre. As to the price, the commissioners state that –

The price to be paid is large, per acre, but it has been definitely demonstrated that gold in paying quantities is to be found there. This is shown by the fact that considerable quantities have been surreptitiously mined and carried off, and by the facts shown in the report of Mr. Walter H. Weed, of the Geological Survey, submitted herewith.

These Indians have not made the progress in the last few years that they should have, and will be far front self-supporting when payments under the agreement of 1887 shall have expired.

It seems absolutely certain that some agreement must be made with them for the purchase of a part of their lands, or that they must receive gratuitous support from the Government for several years to come, to prevent suffering and starvation among them. Only a small portion of their reservation can be used for the growing of crops, and they must eventually rely upon the raising of cattle for their support.

Taking into consideration the valuable mineral deposits known to exist within the ceded tract and the necessities of the Indians, I am of the opinion that the price agreed upon by the commissioners is not more than the land is worth. No immediate appropriation is necessary except such sum as may be required to make the survey of the new boundary provided for in article 6 of the agreement. It is thought that by a wise expenditure of the money provided for in this agreement for the purposes mentioned therein, and the balances that can be saved from the annual appropriations for the benefit of the Fort

Belknap Indians under the agreement of 1887, the Indians can be assisted for nearly eight years yet to come, by which time it is hoped that they will have so advanced in industrial habits as to need very little, if any further, help from the Government.

The other provisions of the agreement commend themselves. I deem it expedient, however, to invite attention to article 5, which provides in effect that no allotment of lands in severalty shall be made during the existence of this agreement, and thereafter until a majority of the adult male Indians shall request it in writing. As to this I wish to say, that while I would oppose such an agreement as a matter of general policy, I think that, in view of the character of the reservations in Montana, and condition and education of the Indians thereon, there would be no serious objection to such an arrangement with respect to them. It is well known that there are very little if any lands on this reservation that are suitable for agricultural uses, and that a great part thereof is valuable for stock-raising purposes, and that it will be some years before the Indians will likely reach such a position in advancement toward the customs and habits of civilized life as to make it advisable to extend to them the allotment policy of the Government, even if their lands were suitable. I therefore see no objection to said article 5 as applying to the Fort Belknap Reservation.

I have prepared, in duplicate, a draft of a bill to ratify this agreement and to appropriate $1,500 to make the survey of the new boundary of the Fort Belknap Reservation established thereby, if so much be necessary, and have the honor to transmit the same herewith, with the recommendation that one part be transmitted to the Vice-President to be laid before the Senate, and the other be

transmitted to the Speaker of the House of Representatives to be laid before that body.

I also transmit two copies of this report, two copies of the agreement, two copies of the record of the proceedings of the councils at which the agreement was negotiated, and two copies of the report of the commissioners, and of the report of Geologist Weed, referred to therein, with the recommendation that one copy of each be forwarded to the Vice-President for the information of the Senate, and one copy be forwarded to the Speaker for the information of the House of Representatives.

I have made no suggestions in the draft of a bill to ratify this agreement, herewith submitted, touching the disposition of the ceded portion of the reservation after the survey of the new boundary line, for the reason that I have thought that that is a matter for consideration by and recommendation from the Commissioner of the General Land Office.

The original agreement and the papers which accompanied it are retained in the files of this office.

Very respectfully, your obedient servant,

D. M. BROWNING, *Commissioner.*

THE SECRETARY OF THE INTERIOR

THE COMMISSIONER OF INDIAN AFFAIRS.

SIR: The commission appointed under authority of the act of Congress, approved March 2, 1895, to negotiate with the Fort Belknap and Blackfeet Indians for the surrender of certain portions of their respective reservations in the

State of Montana, have the honor to submit the following report of their negotiations with the Indians on the Fort Belknap Reservation:

The commission reached this reservation on Sunday, September 29, 1895.

It was found necessary to visit the lands proposed to be surrendered in order to ascertain their extent, and to obtain a description thereof. Accordingly, two of the commissioners, Messrs. Pollock and Grinnell, made a trip to the mountains, taking with them Indians from each of the tribes, Assinniboines and Gros Ventres of the Prairie, residing there.

Arrangements had been made with the agent to notify the Indians that a council would be held on the following Saturday, and one was held on that day, as also on October 7 and October 8, at which time the terms of an agreement were virtually decided upon.

An agreement drawn in accordance with the understanding reached was submitted to the council on the 9th, and received the signatures of a majority of the male adult Indians of the two tribes.

Mr. Clements on account of ill health was compelled to start for his home on October 6, and leave the completion of the work to the other members of the commission.

The time of the visit to this reservation was unfavorable because a change of agents was just being made – the new agent taking charge on October 1 – and because there was a political quarrel in progress in the Gros Ventre tribe. The young men of this tribe were in rebellion against the leadership of the older men, and sought to

assert their independence by opposing the sale of any of their lands, the older men being in favor of the sale.

Out of a total of 334 male adult Indians of the two tribes, 190, being a majority of 46, signed the agreement. This included about five-sixths of the Assinniboines and only one-fourth of the Gros Ventres.

The amount of land ceded can not be definitely stated, but it is supposed to be something over 40,000 acres. The price agreed to be paid is large, per acre, but it has been definitely demonstrated that gold in paying quantities is to be found there. This is shown by the fact that considerable quantities have been surreptitiously mined and carried off, and by the facts shown in the report of Mr. Walter H. Weed, of the Geological Survey, submitted herewith.

These Indians have not made the progress in the last few years that they should have, and will be far from self-supporting when payments under the agreement of 1887 shall have expired.

It seems absolutely certain that some agreement must be made with them for the purchase of a part of their lands, or that they must receive gratuitous support from the Government for several years to come to prevent suffering and starvation among them, only a small portion of their reservation can be used for the growing of crops, and they must eventually rely upon the raising of cattle for their support.

This agreement, provides that the money to be paid for these lands shall be deposited in the Treasury of the United States and draw interest at the rate of 4 per cent per annum, and to be expended under the direction of the

Secretary of the Interior at the rate of not more than $90,000 per year.

The agreement further provides that the boundaries of the ceded lands shall be surveyed and marked before the same shall be open to occupancy by the whites; also that no allotment shall be made during the existence of this agreement, nor afterwards, until the same shall be asked for by the Indians, and that the provisions of the agreement of 1887 not in conflict with this agreement shall continue in force and effect.

The minutes of the different councils transmitted herewith will show the position taken by these Indians and the reasons for incorporating in the agreement the various provisions found there.

Every effort was made to conduct these negotiations in such manner as that the Indians would fully understand all that was said, and to that end it was necessary to have an interpreter for each tribe and two for the commission. No promises were made or assurances given that anything would be done for them other than what is provided for in the agreement.

Respectfully submitted,

WILLIAM C. POLLOCK.
GEO. BIRD GRINNELL.

DECEMBER 14, 1895.

PROCEEDINGS OF COUNCILS OF THE COMMISSIONERS APPOINTED TO NEGOTIATE WITH THE FORT BELKNAP INDIANS.

FORT BELKNAP INDIAN AGENCY, MONT.,
October 5, 1895

In pursuance of a notice issued by the agent, the Indians and commissioners met in council on Saturday, October 5, 1895.

The services of a stenographer had not yet been obtained, and therefore the proceedings of this council were not taken down in full.

It was soon developed that there was a dispute among the Indians as to the advisability of disposing of any of their lands. It was deemed best to adjourn the council until Monday, October 7, to give the Indians time for consultation among themselves, and this was accordingly done.

FORT BELKNAP INDIAN AGENCY, MONT.,
October 7, 1895.

On this day Commissioners W. C. Pollock and George Bird Grinnell met the Indians in council, and the Indians having requested that the proceedings might be reduced to writing, their request was complied with, and the following is the stenographic report of said proceedings:

The commissioners having announced to the Indians that they were ready to hear from them, the following Indians addressed them, each through the proper interpreter:

WHITE WEASEL (Gros Ventre). You commissioners have come to get part of the reservation, and I can't very

well spare any of it. I don't like to sell it. I don't want to sell. That is all I can say. (White Weasel here touches the stenographer's pen in testimony of his statement.)

SLEEPING BEAR (Gros Ventre). The Indians are talking all different and I don't know what to do, and so I think I will not sell; that is all I can tell you. I can't sell any of the reservation.

BLACK WOLF (Gros Ventre). I can't sell any of the reservation; the reservation is small enough now; I can't sell any of it. [Black Wolf here touches the pen in testimony of his statement.]

PADDY SKINNER (Gros Ventre). I like my land and I can't give any away. I don't want to sell it, because I like my land.

JERRY RUNNING FISHER (Gros Ventre). I am willing to sell a part of the reservation. I think I will do well afterwards if I sell a part of the reservation.

OTTER ROBE (Gros Ventre). I say the same as Jerry (Running Fisher); that is all I can say. I am willing to sell.

FLAT HEAD (Gros Ventre). I don't like to sell.

MAN SITS HIGH (Gros Ventre). I like what you told me; I want you to help me.

BUSHY HEAD (Gros Ventre). I am willing to do as you three men advised me. I would like to get more cattle; that is all.

LAME BULL (Gros Ventre). Look at my hair; it is gray. I say the same thing as I said before – I don't want to sell.

MANY EAGLE TAILS (Gros Ventre). I will not sell my reservation; I like it. This is the proof that I will not sell it. [Many Eagle Tails here touches stenographer's pen.]

WHITE BIRD (Gros Ventre). I like my reservation and I want help.

FRANK LOPER (Gros Ventre). My reservation is small enough and I don't want to sell it. I want to touch the pen to prove that I don't sell it. [Frank Loper here touches the pen.]

Mr. Pollock here addressed the Indians, through Interpreters, as follows:

My friends, we had a short talk with you on Saturday. At that time you had not agreed among yourselves what to do; one of you would talk one way and another one another way. This was very bad; we were very sorry to see it. We had thought by waiting until to-day that you would have been able to come together and follow one path. We are sorry to find that you are not yet agreed.

We are not here to try to force you to sell any of your land. We are willing to advise you what we think will be for your best good to do. We told you on Saturday that we saw no way for you to get beef, cattle, flour, wagons, or anything else after your present agreement expires, unless by the sale of some more of your land. We still believe this is the best plan for you. If the majority, the most of you, do not think this all we can do is to go back to Washington without having done anything. If we do this and you come to the agent three years from now and ask him for something to eat, or for a wagon, or for some cattle you will be very much disappointed when you can not get it. If, then, you go back to your women and babies without anything,

and they are crying for something to eat, you will be sorry that you did not think better at this time.

I understand that some of the young men think that they should have more voice in the affairs of the tribes; but I want to say to them that the way to get that control and influence is not to go wrong; the way to do it is to go right. I want to say to these young men to think well what they are doing at this time, because if they go wrong now they will never have any influence with their people after this.

The land which some of you are ready to sell is not used by anybody. We were up there and looked at it. There is no timber there; there is no grass there; there is no place that you could plow and sow oats or wheat; you can grow nothing there. As we said before, we don't want you to part with any of your grass lands; we don't want you to sell any of your timber lands, and we want you to keep it so that you will have all the water that you need. All these things you will need, and in addition to them, all that you can do here is to raise cattle. We want to see you put in the way of getting enough cattle so that you will have a good many to sell every year.

We are sorry that you have not done better with the cattle you had before, but we believe now that you are ready to do better when you get some more. I don't know where you are going to get them because you haven't money enough now to buy cattle and to feed your people as long as they will need it.

I will only say again, think over these matters carefully, and be sure you are right if you still refuse to sell.

Mr. Grinnell then addressed the Indians as follows:

I see that some of you people are pretty blind; you can't see far. You see the things that are close to your face, but the things that are farther off you can't see at all. You are like people looking through a fog – you see things near by, but the things far are hidden. You think that because for seven or eight years you have had plenty to eat and have lived well, and for the next year or two you are going to have plenty to eat, that it will always go on like that. That is not true; it is not going to last. I go about among different people and see them, how they are fixed, how many cattle they have got, how they farm; I don't see anybody as poor as you people.

Two years from now, if you don't make any agreement with the Government, you will just have to kill your cattle and then you will have to starve. It makes me feel badly to think of this. If you sell some of this land and get money enough to keep you going for some years longer, and then work and take care of your cattle, after that you will be like white people and be able to take care of yourselves.

When a white man wants money, he takes something and goes to the store and the trader gives him money that he can put in his pocket; that supports him; that buys food for his wife and children. The only thing you have to sell is this little piece of land that you do not use. I should like to see you sell that, because if you don't I can not tell how, after these two years are gone, you are going to live – you or your wives or children.

THE MALE (Assinniboine). I agree with you in your purpose in coming out here to buy a portion of the reservation. I would like to see my own people living. I want you when you return to Washington to tell them that I said

"Yes," and that I like to live and I am willing to sell a portion of the reservation. I was raised without starving, and I would like to live that way; that is the reason I say "Yes."

LITTLE CHIEF (Assiniboine). I have something to say to you, and I am not ashamed to say it. I am glad to see you here. There are many bad men among these people, but I am not one of them. I am willing to go the way you advise. I am a poor man, and when you come here and support me for a few more years, I am glad of it. You have come out here to buy the mine, but I don't like to sell any other portion of the land, but I am willing to sell that mine. I would like to have a ten-year treaty again, and by that time the generation to come might be able to support themselves alone. First of all things I would like to have some cattle, as that is the true factor to live with. And next to cattle I would like to have some implements, the same as you people use. As you stated, I would not like to sell any of the forest, grass, or water, but I would like to see the future generation live upon that, if possible. You see me here before you, and you can see that I am weak, and not strong. You see me stand here, weak, and I cannot dig that mine, but your race can, and I would like to make a ten-year treaty with you.

WETAN (Assinniboine). When I see the commissioners come out here to buy a portion of the land, I generally agree with them. I always look to the future and see how my children are going to live. I would like to receive a ten-year treaty for this land. I can't count money, but I would like to have a ten-year treaty, and furnish us with some cattle that we can raise. I would like to have a little more mowing machines; there are some in the warehouse, but it

is a hard time to get them out. I would like to buy some mowing machines if I had the money.

MEDICINE BEAR (Assinniboine). I am a poor man and I will listen to what you say. I always think about living. If I was thinking of dying I would have been dead long ago. I like to eat, and that is why I am living. Ever since I was born I have been accustomed to no privations, and that is the way I like to live. That is the reason the Great Father has sent you commissioners out here. When I see you out here I see that I can live yet, and that I am going to have some more meat yet. The only thing that I am living for now is eating. Ever since I have been living there hasn't been a day but what I have had something to eat all this time. It makes me feel good when I hear a man talking about that I can live yet. I am living now and I have a hard time, and when I think that the Great Father thinks of me, and sends you out here, it makes me feel good. I am willing to do as you advise; I say "Yes" to what you ask.

It is the Great Father that has kept us alive all this time, and that is the same Great Father that has sent you out here that I may live, and I am thankful for it. I am not willing for you to fool me; I don't like to see you fool me, and I don't like to fool you neither. You see for yourself that these Indians are poor, and when you get back to Washington you must show these papers what we say here. You are afraid to tell a lie, and I am just the same way. I would like to have a ten-year treaty with the Government. I want to receive many things from the Government so that I won't suffer anything. I am very poor – I am very poor, and that is the reason I am so thankful to see you come out here to make a treaty with us. I am not willing to sell the forest, nor the water, nor any of the things that you mention – that is, the grass, wood, and

other things – but I am willing to sell that mine. I would like to see you work it to your benefit.

EYES IN THE WATER (Assinniboine). I am glad that you want to exchange this mine for something that we may live upon. I have told you that I like to live and that I would like to make a ten-year treaty with you. I want you to take that down. I don't like you to fool me, but I want you to help me to live and help me to accomplish this. I mean everything – implements and other things – and if you follow that out I will sure live. The Great Father has built the schoolhouse and this place here, and I hate to see any of the children taken away to the Eastern schools. I don't want no big fence on the reservation. You see these Indians around here; they are very few, but when you come out here with the intention of making a treaty with them so they will live they feel good over it. I am not willing to give you the wood, nor the grass, nor the water, but only these rocks lying around the mines, and don't shut off the water. If you don't touch those things the people might live a little while yet. I am not strong, but if you agree to what I ask, these people around here will live. I would like to have a ten-year treaty again.

NO BEAR (Gros Ventre). You commissioners have come a long ways to get a small portion of my land, and I am willing to sell it; I want some more cattle for it. I am not willing to sell the timber, nor the grass, nor the water, but I would like to get cattle for that mine. That is all I have to say.

LONG KNIFE (Assinniboine). I felt good when I heard you were coming. When they made the former treaty with us there was many things that they didn't carry out that they agreed to carry out. They said a good many things

that was good to us, but they never carried them out; but you commissioners, I don't want you to treat me that way. You have come here with the intention of making a treaty that we should live. There is no other tribe of Indians that I have charge of, only this, and that is all there is living now.

These Indians sitting around here, I would like to see them have something to eat and live yet; that is what I think. You come out here with the intention of buying the mine and I am willing to give it to you, but not over a mile wide. I don't know how to count money, but I would like to make a ten-year treaty, so that by that time I might have a couple of children raised. You see these people around here (Assinniboines) are all of the same mind, to sell. I don't know whether you will fool me or not, but that is what I have been thinking of – whether you will fool me. I ask for a ten-year treaty, but you can get more money out of that mine than a ten-year treaty will be. I would like to raise my children, and that is the reason I say that. I don't know how to work or anything yet, and the time is coming close before I am ready, so I would like to make a ten-year treaty again. There is only three years left on the other treaty, and I don't know a thing yet. I have come to realize that I don't know anything, and then when I look upon my children I wonder how I am going to raise them after that three years is up. Beyond that I have nobody to rely on except you and the Great Father, and I don't want you to fool me. I want to make a treaty. If you fool me you will make me poor. And another thing, I don't want to see any of my children go off on that railroad over here. There is two schools on this reservation; there is one here and one at the mountains, and I want to see them go to school there. That is all.

BAD DOG (Assinniboine). I am thankful that I can live yet. I am glad that the Great Father sent you out here that I might live. When the Great Father has anything to say to me, I always say yes; when you advise anything hard to me I always say yes. I am an Indian, but I think myself to be a white man. You ask for that mine, and I am willing to give it, but I don't want you to touch any of the rocks or grass or water; that is what I will depend upon. I want cattle. I mean everything that I say. [Bad Dog here touches the pen.]

BLACK BULL (Assinniboine). I have heard that the Great Father has made treaties with the Indians that used to be further up the Missouri River, but it has come this far. When they have any talk like this with any of you people, I never come, but this is the first time I come. These chiefs have agreed to give you the mine, and I am willing to give it also. If you make any agreements with us, I don't want you to fool us. These chiefs are asking for a ten-year treaty, and I would like to carry it out. I have spoken to you now, and I have not much to say to you.

CLOUD BEAR (Assinniboine). I am also in favor of giving that mine over there. I don't want you to ask for it twice, I am willing to give it the first time. I would like to receive some live stock – some cattle and some steers. I favor that ten-year treaty. I don't know how to count money, but whatever amount it is, I would like to have it run out for ten years.

SNAPPING WOLF (Assinniboine). All these are my grandchildren (referring to assembled Indians). When I think of you coming out here to treat with us I feel good. You have asked for that mine and we told you that we would give it to you. All these young fellows in the

Assinniboine tribe all have the same mind about it. You have come out here to give us a treaty and I feel good over it. This major, here, who watches over our rations, we would like to have you tell him to give us a little more rations. You have tried to make white children out of my children by sending them to school, and I feel good over it. I feel good from the fact that my children go to school on this reservation; these children will work together when they grow up. All these Indians' children are all weak, and they are not able to do anything yet for themselves. If you will make a ten-year treaty, they might be able to do something for themselves in less than ten years.

THE ASSINNIBOINE (Gros Ventre). I don't want to sell the reservation; I like it. I can't very well sell it, as the reservation is small. That is all I can tell you.

HORSE CAPTURE (Gros Ventre). I can't sell the reservation myself; I leave it to the school children.

THE FORK (Gros Ventre). My reservation is very small, and I am not willing to sell any of it. I want to live and stay here, and I am not willing to sell it. [Touches the pen.]

SLEEPING BULL (Gros Ventre). I am not willing to sell. That is all I have to say. [Touches the pen.]

THREE WHITE COWS (Gros Ventre). I want you to have pity on me. I am tired now taking care of this agency. The Great Father gave me this tag I have got on me to be a policeman. I want you to tell the Great Father the truth, and I am going to tell you what I think. I want to get some cattle, and I would like to make a treaty for a few more years so that I can get grub to live on. My people here, these Gros Ventres, say that they are willing to let a portion of the reservation go, a little on the other side of

the sawmill – a strip through there. I want you to help me. That is all I have to say.

GRAY BEAR (Gros Ventre). I am willing to sell.

BEAR SHIRT (Gros Ventre). I am glad that you come here to make me live good. I am willing to let a part of the reservation go, but I am not willing to sell the timber nor the grass nor the water. That is all.

CAPTURE (Gros Ventre). I am not willing to sell the reservation. It is very small, and I like it. That is all.

BULL ELK (Gros Ventre). I come here to see you, to tell you that I am willing to sell a portion of the reservation, but I am going to have some of the Indians to go out, and we want to know exactly how big a portion of the land you want. Eating is the only thing that makes people live, and if I don't eat, I will not live. I am not willing to sell the timber nor the grass nor the water, but just that little strip of land there where the mines are.

RAGGED ROBE (Gros Ventre). I am willing to sell a portion of the reservation, but he is not willing to sell the timber nor the grass nor the water. That is all I have to say.

CURLY HEAD (Gros Ventre). You have come a long ways to get a part of the reservation, and I am willing to let it go, but I am not willing to sell the timber nor the grass nor the water. I would like to get cattle for it.

BULL'S HEAD (Gros Ventre). All I am willing to sell is that strip of land were the mines are; I would like to get mines for it. I am not willing to sell the timber nor the grass nor the water.

LITTLE SHIELD (Gros Ventre). I can't very well spare any of the reservation; it is very small and I like it. I am thinking of the treaty that I made before with the whites; it was just like they took the land away from us for nothing. That is all.

IRON BOY (Gros Ventre). I am not willing to sell the reservation.

HEAD DRESS (Gros Ventre). I like cattle and I think that is the only thing that will make my children live. I am willing to sell that little portion of land where the mines are, and I want to get cattle for it.

RUNNER (Gros Ventre). I am not willing to sell any of the reservation.

THE BREATH (Gros Ventre). I say the same thing that Lame Bull said; I am not willing to sell any part of the reservation. This land was given to me, and I like it, and I can't spare any of it.

BLACK FOOT (Gros Ventre). My reservation is small, and I don't care about selling.

CROW (Gros Ventre). I am not willing to sell part of the reservation.

THE DREAMER (Gros Ventre). I am not willing to sell the reservation; it is small, and I like it.

THE GRASS (Gros Ventre). I am willing to sell part of the reservation. We are going to have the police to go out there and show you how big a land we want to sell. I would like to get cattle for it. That is all I have to say.

LONE BIRD (Gros Ventre). I am not willing to sell the reservation.

NARROW MAN, or DEAFY (Gros Ventre). I am willing to sell that portion of the reservation where the mines are.

SITTING BIRD (Gros Ventre). I am not willing to sell part of the reservation. We would like to have the reservation remain as it is; we like the mountains.

THE RIDER (Gros Ventre). I am not willing to sell the reservation. They marked out the reservation for me and I want it to remain as it is.

YOUNG MAN (Gros Ventre). I am not willing to sell a part of the reservation. I can't very well believe that you men were sent from Washington to buy this portion of the reservation. I think that you men come out to buy that part of the reservation yourselves and then sell it to the Great Father afterwards.

FRANCIS LUNGS (Gros Ventre). I am sorry to tell you that you come up here for nothing. I can not sell part of the reservation. I want the reservation to remain as it is.

THE WARRIOR (Gros Ventre). I am not willing to sell the reservation. That is all I have got to say.

BLACK WOLF NO. 2 (Gros Ventre). I am not willing to sell the timber, nor the waters, nor the grass, but I would like to get lots of cattle. I would like to make a treaty for ten more years. That is all.

HARD TAIL (Gros Ventre). I can't very well spare any of the reservation because it is very small.

GO TO WAR (Gros Ventre). A little over the other side of the sawmill, I am willing to let that portion of the reservation go; I am willing to sell that. I would like to get

cattle for it, so that my children can live; I don't care for myself; I am getting old now.

LITTLE PINT (Gros Ventre). You two men come up here to buy a portion of the land; I can't spare it.

TRUTH (Gros Ventre). I am not willing to sell the reservation. The reservation is very small and I can't spare it.

LITTLE CHIEF (Assinniboine). When there is a man comes to buy anything, and be able to buy it, he will go home feeling good. You come here to ask for something and all these people here say, yes. I want you to go away from here without being ashamed. I would like to see you give these two tribes here cattle, and crackers, and other things to eat.

JERRY RUNNING FISHER (Gros Ventre). I would like to see you men go home happy. We are willing to sell part of the reservation. All the old people and these people that have good sense are willing to let the reservation go; but them young fellows are like children playing – they don't know what they are talking about. I would like to have you give me a beef or two in the tribe, so they can have a little time. We are willing to sell the reservation.

OTTER ROBE (Gros Ventre). When I went back East to Washington and saw the Commissioner there, the Commissioner told me that this reservation belonged to me, and I could do as I liked with it; and now I am willing to sell that portion of the reservation, and I would like to get lots of cattle for it, and I would like to make a treaty for about ten years more. I am not willing to sell the timber, nor the waters, nor the grass. That ends the council.

JOHNNY (Gros Ventre). I am not willing to sell.

BACK FAT (Gros Ventre). I don't want to sell the part of the reservation.

TAKES THE GUN (Gros Ventre). The reservation is small, and I don't care about selling.

OWL'S HEAD (Gros Ventre). I not willing to sell the reservation. I want my children to live on it after I am gone. I think, maybe, that the children will be able to work the mines – those children that are in school.

RETURN TO WAR (Gros Ventre). I am willing to let that portion of the reservation go. I am willing to let that strip of land go, but not on this side. You will have to make the agreement first how much land you want and how much the Indians are willing to let go.

TURNS TOE (Gros Ventre). I am willing to let the part of the reservation go.

EAGLE CHILD (Gros Ventre). I am very glad to see you men here come to buy that small piece of land, and I am willing to let it go, and I would like to get cattle for it.

THE BULL EASILY KILLED (Gros Ventre). I am willing to let that strip of land go. All I want is cattle for it.

Mr. Grinnell here addressed the Indians, as follows:

Now, we have listened to all that you people have had to say, and have been glad to hear everything that each man has said. After listening to all that you have said we feel sure that most of the people want to sell; some of them do not. Most of you can see clearly; some are blind yet. I hope bye and bye, you can all see clearly. One thing we like, that is what you said about the land, that you didn't want to sell the grass nor the timber nor the water.

Another thing is good; you all say, all who want to sell, that you want to begin a little on that side of the sawmill just a little strip; that is good.

Before we talked to you at all, we went down south there to see this country, to find out what you could sell without selling any grass or timber; and so that you might all understand what we had been doing down there, we took with us some men from each tribe. They went with us and they know the land we looked at, and I told the interpreters to tell them just where we run the line. They can tell you what the land was that we looked at. These men were Nosey, and Black Bull, Seven Persons, and Sleeping Bear, and The Capture. The Capture was with us only one day, I think; the other men were with us both days. Maybe there were some others, but I don't remember their names.

The strip of land we talked about lies north of the south boundary of the reservation and east of the high ridge that is east of the mill, and south of that ridge that is on the north side of the North Fork of Peoples Creek. There is no timber in there and no grass. It is a little small strip of land where nothing grows, where there is nothing but rock, where there is no game so far as I could see, and I could see no water on it. These men can tell you what it is. You people don't use it for anything; it is no good to you. It is good only for what is under the ground there. Some people think that there is mineral there, but nobody knows very much about it. Now, if there are any of you that do not understand, that want to ask any questions, let them ask them and we will try to answer.

Council adjourned until tomorrow morning at 10 o'clock.

On October 8, 1895, the council met again and Mr. Pollock addressed the Indians as follows:

My friends, we had a long talk yesterday. From that talk we believe that the most of you are willing to make an agreement to sell that mineral land. There were some who were not then ready. I don't know whether they are now willing or not, but if more than half of you are willing to sell it and we can agree on the terms it will be a bargain anyhow, whether all agree to it or not. As long as it was in doubt whether more than half of you would be willing to sell we thought it best to say nothing about the price or terms; we think it is now time to begin talking about that.

As we told you yesterday, any agreement we may make must be sent to Congress and agreed to by it. If we put anything into the agreement that Congress won't accept, they will throw it away and it will be worse for you than if we had made no agreement. We want to come to some understanding with you which we believe Congress will accept also.

When you made the former agreement you sold a great big quantity of land – more than you have now in the reservation, perhaps. For that the Government agreed to pay you a good big price, to be spent so much every year. The land you now have to sell – the land that we think you can spare – is a very small piece compared to what you sold before. It must be plain to you that you can not expect to get for this little piece of land as much as you got for that large body. We want to give you all that we believe Congress will approve of. As many of you said yesterday, you can not count money, and it will be a hard matter perhaps for us to make each other understood what we mean; but we will do the best we can, and hope we may be

able to come to an agreement without any ill feeling on your part, and I know there will be none on ours.

MR. GRINNELL. My friends, this is a very important thing that we are talking about now. It is more important for you than it is for anybody else, because it has to do with your living. The Great Father wants to see you live, and we who have been out here among you, we want to see you live and do well. We are glad that the most of you want to sell this land; we are sorry that some do not; but they are young men, and we hope that when they get a few more wrinkles in their faces they will be wiser.

We have just been up talking to the Blackfoot people, and I showed some of you to-day on the map how big a piece of country they sold. This was a big piece of mountains, perhaps twenty times as large as the piece you are talking about selling. You could take this piece of land down here that you are talking about selling and put it down on that land that they sold twenty times, and it would not cover it all. You all know enough about trading to know that when a man has a calf to sell he doesn't expect to get as much for it as he does for a great big steer; so you can not expect to get as much for this little piece of land as you did for the big piece of land which you sold when you made the treaty eight years ago.

Yesterday when you talked to us we were not sure whether all wanted to sell. We couldn't be sure that you might not refuse to sell, and so when you talked about a ten-year treaty, we didn't say anything because we wanted to wait and see how you felt. We want you to get all the money that you can, so that you can live, you and your wives and your children, so that your little ones can grow and be happy but we don't want to make fools of you. If we

should make a treaty with you and promise to give you a ten-year treaty and a great big price, we would go away east and you would think, well, this is all settled now, we are going to be happy. Then very likely Congress would say, this is a bad treaty; these men that we sent out are foolish men, and they would throw the thing away. Then you would all think that we were fools, and that we had made fools of you. When we go away from here we want you to feel that we are your true friends, and we want you to remember us always, and not forget us, so we don't want to tell you anything that won't come true. Now, I will sit down and let you people talk.

SLEEPING BEAR (Gros Ventre). You ask me for a very small piece of my land, and I don't think I will get very much for it, and so I say the same thing as I said yesterday. It is very small and I don't think I can get very much for it, and I couldn't get much grub for it. It is very small and I don't care about parting with it. All those young men that you had a talk there with last night, they have made up their minds not to sell that part of the reservation; they will take the consequence.

JERRY RUNNING FISHER (Gros Ventre). I can't say any different than what I said the other day. Most of these people are in favor of selling. That is all they depend on, is what money they got from the government – they have got nothing else to depend upon. I walk around and try to look for some other way to make a living and I can't; I have to come back and be supported by the Government. When I went back East to Washington, I told them the same thing. The Commissioners back East told me that there were going to be some men come out here to see us about this land. They told me that this land belonged to me, and that whatever I said would be so. If I sold it or if I didn't sell it

– whatever I said, it would go that way. It is like a white man that has money; that money belongs to him and no other person; that is the way this land is with me. I believe every word that you have told me. I know that you can't promise me anything. When you get back East to Washington, then you will know what is going to be done – what they will do back East.

All of these people that you see sitting over there, the most of them say the same thing. All of those young men on one side there, they are led by the old Lame Bull, and they say the same thing as they did before. I have another thing to tell you, and I wish you to help me all you can. When horses are hungry they can not work very hard; if a man eats he can work good. This agency is a good place for us to get grub. The people at the mountains are all good workers, but they are not very well taken care of. I don't know the reason for this, since they always do as the agent tells them. Quite a number of Gros Ventres have been among the Arapahoes and lived there quite awhile, and now they have come back to their own tribe, and they would like to stay here; they would like for you to help them. I know that every Indian's name is down in a book, and down strong, but it should not be impossible for a Gros Ventre to come back to his own tribe – they were born here. I want the agent to know all about it, and I wish for him to help them all he can.

LITTLE CHIEF (Assinniboine). When the agent says anything we remember it. We sold a large tract of land before and they promised many things, and they have not fulfilled those promises; I remember all of that. But you have promised to give me a fair deal in this transaction that you are about to make. There must be some mineral land there or else you wouldn't be after it so hard, and

therefore I look for a ten-year treaty. I know there is mineral in that land, and it may be precious, but I am willing to let it go on a ten-year treaty. First of all, in the next treaty I would like to have some cattle; that is what these people ask for. The next thing, I want plenty of food so that the next generation to come may depend upon it. All these people sitting here are asking for the same implements and other things you use in making your own children; they want to have the same implements. I am living along this Milk River and there are people up here on the river damming the river up. Even the river here is getting dry, and I am getting hard up for water.

BLACK WOLFE (Gros Ventre). I can't say any other way than what I said yesterday. I can't sell any part of the reservation. All of those young men say the same thing.

OWL'S HEAD (Gros Ventre). What I said to you last night I remember yet. I am an Indian and I can't tell anything only when I see it by my eye. When they made the treaty up at the old agency it was the old men that made the treaty, and they sold a very large piece of land, and all the whites are living on it, and they are making a good living on this land that we sold, but what they paid us is going to run out pretty soon. This is a very small piece of land you are buying now, and you wouldn't pay us the same for it again. That is the reason I don't care about selling that small portion of land, because I don't expect to get much for it. That is the reason I like this land of mine, so that the people will live on it; and I am not ashamed to talk about it, either.

WHITE WEASEL (Gros Ventre). When these white men come to buy any land from us it is like when a child cries and you take sugar and give it to him to make him stop

crying. That is about the way they have always used us. When they made the treaty before I didn't know much, and that is the reason we gave a large piece of land away; but now I know a little better and I can't spare any of my land. Every year there is a little money grows in the garden and the oats brings a little money, too. The whites say that there isn't much money in that mountain, but I don't believe it; therefore I don't care about selling it. I think that after you buy that small piece of land you can do what you like with the balance of the reservation. After you get that small piece of land there is going to be a good many white men in there, and I can't sell it. We have been told that in three years the time will expire, and after that it is our own lookout, and if we can't work we will starve and die.

RUNNING CROW (Gros Ventre). You have talked three times now, and I have never said a word. This is the first time I ever talked to you, and I am going to tell you what I think. I say the same thing as those young men say; I think they are wise. If we should choose a headman out of those young men, I think we would get a good man. I don't know which is the worst of the two sides, but I am just as liable as not to get on the wrong side. That is all I have got to say.

WHITE MOON (Gros Ventre). I am quite an old man now; I am at the age now when a man can't work. Those young men are my headmen. I can't say any different than what they say. If we can't work we will all starve, so I can't sell any part of the reservation.

BLACK BULL (Assinniboine). I told you about it yesterday. I have been accustomed as far back as I can remember that the old men have generally been considered to be

able to speak with commissioners, and therefore I still depend on them yet. I had a long talk with you last night, and I told you that they would make plenty of talk, but I told you to be patient and listen to all the talks. Listen to all that speak, and take back with you to Washington the speeches of those who have spoken with any common sense, and show it to those people there, so that they may understand that we want to live. Those chiefs, the old men here, are willing to give you that small portion of mineral land which you wish for, and half of the rest of the people are willing to let it go anyway. Whenever a man buys anything that is small; if it is good he generally gives a good price for it. These headmen have already asked you for a ten-year treaty. I want the Great Father to give me something to live on.

FLAT HEAD (Gros Ventre). What I told you last night I want you commissioners to carry to Washington – what we have said. You have told us about the wrinkles on our faces that we were going to have. That is just what we want, is wrinkles in our faces; and after these old men are gone I don't know how they are going to control this reservation. Therefore all these young men are not willing to sell that portion of the land. These people that are willing to sell this land, I want to see them have smooth, fat faces. I can't sell that land.

CURLY HEAD (Gros Ventre). I am glad that the commissioners listed to those Indians that are willing to sell that land, and I wish I could get what I ask for it. If you go back to Washington without having made any treaty it wouldn't look very well, and therefore I am willing to let that portion of the land go. I don't know how those young fellows that refuse to sell that land are going to make out whether they are going to blacksmith for themselves. It

will be quite a number of days yet when I can come and get what I need, and that is the reason I am willing to sell that land. I am glad that the commissioners said "Yes" to those old men.

PADDY SKINNER (Gros Ventre). I like those mountains and I can't sell them. If all my hide falls off my face it would be all right; even if my finger nails drop off it would be all right – that is what I think. That is all.

THE STABBER (Gros Ventre). I say the same as those two men, those policemen, told you there; I think the same as they. I am willing to let that land go from the other side of the sawmill.

THE BREATH (Gros Ventre). I can't say any different from what my friends say; if I starve to death it will be all right. I never had anybody to show me the white man's ways; all the things I know I learned myself. I want you to tell these people here that you are going to give cattle to to [sic] take care of their cattle well. I learned what I know myself, and I never had anybody to show me or tell me. I learned myself how to take care of cattle, and when my cattle are gone then I am willing to starve if I must. I can't very well sell any part of the reservation, and that is what my friends, the young men, all say. It was not me that made those lines of the reservation, it was the Great Father gave us this portion of land. Wherever my friends lie after they starve to death I will lie there too, with them.

THREE WHITE COWS (Gros Ventre). You men have come a long ways to buy that piece of land from me, and I would like to see you go back satisfied. I think the same as these men said there; I am willing to sell that piece of land just so that I can get the money for it, and so that I may live. I wish that I could get some cattle so that I could live off of

them. I wish that you would give me cattle for a part of the money, and whatever is left give it to me in grub like we are getting now. We have three years to get grub yet, and we would like to have it extended ten years more.

NO BEAR (Gros Ventre). I don't like to see the commissioners come here for nothing, and this is the fourth time I have said "Yes." I would like to get lots of cattle, then I might be able to live. If it is so that you have come from Washington to buy this land, I wish you would have a little more rations given to us out at the mountains. This council is like to-day – everything is calm. Those Assinniboines that you see have been here with me a long time and lots of them were born and raised here, and they are all willing sell that piece of land, and I agree with them.

BUSHY HEAD (Gros Ventre). You were sent here from Washington, and I would like to have you take down to Washington what those Indians have said, and those that are willing to sell, and next summer I will know what to do. It is like a horse race to-day when two horses come out even – that is the way it is with the talk. Maybe after while those young men will know what to do if you tell them what you are going to pay them for the land. They will be glad then – they will trade even then. We won't let the whites take the land as they will; we are going to have it our own way how much land we are going to sell. That is all I have to say.

RETURN TO WAR (Gros Ventre). I am willing to sell that piece of land. The policemen are going to go up there when you show us the line. I would like to get some more beef killed for me at the mountains. I say the same as those Assinniboines say – that I am willing to sell. All

those old men have sold you that land and I will sell it, too.

LITTLE MAN (Gros Ventre). I say the same thing as those headmen, those policemen – I am willing to sell. When those old men made a treaty up, above at old Fort Belknap, they talked good for the young people, and we have had pretty good living so far. I am willing to sell that piece of land that those old men have told you that they would sell, and I wish to make a ten-year treaty. I think that I can make a living by having cattle, and as I told you, I am willing to sell.

THE FORM (Gros Ventre). I am not willing to sell.

MANY EAGLE TAILS (Gros Ventre). I can't say no other way than what I said before, that I can't sell. There is no one man has all the say of it; even all the children have a right to this land. I can't say no other way than what I have said before; all these people have a right to this land. I like my reservation and I can't sell it.

MR. POLLOCK. Well, my friends, we have listened patiently to what you have said to us this afternoon. I find that I was mistaken in some of my ideas that I formed soon after I came to your reservation. I told the new agent in talking with him that I thought these young men here ought to be encouraged to take more part in the affairs of the tribes. I am afraid I was mistaken about many of them; they don't seem to be able to look far enough ahead to be trusted to manage any of the business, I believe the people of the tribe will look back on their notions these last few days, and will be afraid to trust them, even when they get to be old men.

As I say, we have talked about this wanting to sell and not wanting to sell as long as I think it well to do. I think a good many more than half of you are ready to sell that land for which you have no use. We have talked among ourselves and also with your agent, and tried to make up our minds as to the very highest figures that Congress will approve. That class of land, when the Government owns it, would be sold for not more than $2.50 an acre. We have concluded to make you an offer of four times that much, or $10 an acre, for the amount of land that is there, as near as we can calculate. I want to be free with you and tell you that I don't think that amount of money will carry you ten years after your present treaty runs out, in the same way that you have been carried; I don't think it will do that. I might have told you it would take you the ten years, and you perhaps wouldn't know any better now; but I don't want you to say after while that I told you false in anything. I want you all to say after we go away that we told you the whole truth about it, and that we didn't fool you in anything.

Under a provision which we expect to go into the agreement, this money can be made to carry you five years longer, or eight years from the first of last July.

We want to put into this agreement, if it be made, some provisions that were not in the old agreement, and which we think will be good for you. You have now in Washington about fifty thousand dollars, which has been saved from former payments. This money is lying in Washington there doing nobody any good. We want to make a provision for this money to bear interest – that is, to grow so much every year, like your herds grow by the calf. We want to make it so not only this that you have there now, but all that can be saved afterwards and added to it will draw interest also.

There is another matter I want to speak about. There has been nothing said by any of you in the council about it, but some of you have talked outside; that is in regard to taking your land in allotments – taking allotments of your lands – dividing them up. Those who have spoken about it have said they do not want their lands divided up among you. At the present, as the law stands, the Great Chief may at any time order allotments to be made and surveyed out, and a tract of 80 acres given to each man and 40 acres to each woman and child; that is a fact, and true as to you and your lands as much as to those of any other Indians. Do you think you would like to have this done now! [Indians answer, "No," through interpreters.] You all say "No." I agree with you. I think the man who is now Secretary agrees with you but you know the men who administer Indian affairs change every four years in Washington, and the change is coming before a great while now.

The President who goes in then, and his Secretary of the Interior, and the new Commissioner of Indian Affairs may say that you must take your land in allotments. That thing has happened with other Indians who did not want to take allotments, and it may happen with you. When we heard some of you say that you did not want your lands allotted we talked among ourselves about the matter, and we said: These people must raise cattle to make a living. They can't do this if they are limited to a little piece of land; they have to have the whole reservation here for a range for their cattle, and we said, if we make an agreement with them and they want it put in, we will put in that no allotments of their land will be made while this last agreement lasts, nor afterwards, until they ask it.

I tell you this now to show that we have been trying to seek for your benefit. We have made the best offer that we

think Congress will approve for this land that is not of any use to you, and if you want to secure these other provisions that I have told you of you will accept our offer. If not, we will have to go away without any agreement.

THE MALE (Assinniboine). You have come directly from Washington and brought word to me about this. I was down in Washington and got a certificate to promise that I should live here. They promised me that I should live with your race as brothers and friends, and then you have come out here to buy that mineral land, and I am considering the thing. I want to live yet awhile and therefore I am willing to give you; I have got that same idea yet. I am a poor man and I am not able to do anything for myself, and I can't eat the dirt and live, but I have one hope and that is the cattle. If you furnish me cattle I may possibly live; I have told you that before. When I was talking to you the other night you asked me whether you would hurt my feelings if you would not carry out your promise, and I told you yes, and you promised me that you would carry out all you told me; I still remember that. And then when you said you could not make a ten-year treaty, I know that the Government is rich yet, not poor.

I remember I told you not to listen to those young fellows, Gros Ventres, just talking like little children playing, but take back with you what the old men have said that has some sense to it. I would like to see plenty of food here that I might live on. I would rather change that mineral land for food that I might live on. You told me just a little while ago that you were my true friends, and I can't see into that. As long as I have been living I have never got so that I could not see anything that was good; I have always been able to see things that are good. Some of these policemen are not willing to sell that tract of land. If

they are not willing to sell that tract of land they ought to take off their uniforms and leave them here and live like the rest of the men. I would like to have you take back with you all of these speeches that have any sense to them, but I would be ashamed for you to show the headmen over there these speeches that the young fellows spoke. I asked for a ten-year treaty, and all that time I want you to teach me to do the right thing, and I will be thankful to you for that. I don't want you to listen to those young fellows, what they have to say.

EYES IN THE WATER (Assinniboine). I have got nothing more to say than what these headmen have already said. These young men here are all wearing the Government clothes; they should take them off of them and then they would have nothing but their breechcloths to go home in. When a man has any sense in talking with white men he talks about things that are reasonable. Ever since I have been looking at that mineral land it has been no use to me, and I am willing to listen to any white man that will make a good offer for it. If these young men were to take these clothes off they would have nothing but the dirt to clothe themselves with. You see me here a poor man; I have got the same kind of clothes, and when I run out I go in the warehouse and ask for them. I just ask for them for ten years. If you don't make that agreement with us these Gros Ventres that hear me talking will laugh at me afterwards. I lay this down plain before you, and I would like to have you tell it when you get back.

I wonder how those Gros Ventres would live if they couldn't get anything from the warehouse here. I have not had anything to eat since this morning and I am getting empty now, and I feel like I would like to see the counsel over soon now, and I wonder how these young men would

like to starve. I would like to exchange that mineral land over there for food, that we may live. That is all the men over there wish. If you don't make an agreement like that with us, those young fellows over there would laugh at me. I was where the Treasury was, and there was money piled up there from here to the warehouse. I was where the money was made, and I wonder how the Government is so poor. Before you go away you promised to be a good friend to me, and I thank you for that.

MEDICINE BEAR (Assinniboine). When a man wants anything and is patient, he always gets it. When a man wants anything and tries hard for it, he generally gets it. When a man wants anything and he has anything to give for it, if he is not stingy about what he wants to give, he generally gets it. And then when they make a trade, both of them generally feel happy over it. When it comes to these boys over here talking and you are not patient, it is all right. You told me that you were after something very important, and you told the truth and I agree with you. It is the beef and the grass and water and wood that I am depending upon and have been living upon. I have no other things to depend upon but the Government, and that has been the one that has saved me so far. If there was any of these fellows had any brains, he would tell you the same thing that I have told you. They are all talking about dying; I am afraid of dying. I would do almost anything to live. The Great Spirit has directed my living; I live as he directs, and then I am dependent on the Great Father also.

Those two have owned me so far, and they have done about as they pleased with me the best way they know of. You asked me something and I have said "Yes" to you; I was willing to give you what you asked for. That is a small

tract of land that you ask for, but you ought not to say it is so small. That is a small tract of land, but it will make some happy if they own it. You ought to treat with me for my benefit, that I may live. There is half of these people talking in the wrong direction to you. All these headmen, noted men, have agreed with you in selling that tract of land. You have agreed to give us a small amount for it, but you may change your mind, maybe; it wouldn't hurt your feelings, anyway, but we would be thankful for it. When a man comes up to you and talks about things that have no sense you don't have to listen to them. You have spoken the truth, and then when I speak (or these other men speak) sense, take it back with you to Washington and show the headmen. Ever since you have been here I have thought that the Government has brought something very important to me; I look ahead and see that that is the only way that I can live, and then I agree with you.

You might think that is small, but I have given it to you already. It may be small, but it will be worth something yet. When a new agent comes here he generally treats us bad, but this new agent we hope will treat us good. When I am in need of anything I want to go up to the agent and ask him for it, and I would like to see him give it to me. I have already spoken to you about the land, and you have brought up different things before me, and now I am going to bring something else up with this small tract of land on this small reservation. When they proposed to have two schools here, I did not agree with them; I wanted only one at the mountains, and it was because of the boys that they built this other schoolhouse. I afterwards agreed with them, but I said in making that agreement I wanted it understood that no children should be taken to Eastern schools or Western schools, but I wanted my children to go

to school here on these reservation schools, and when they get to be the age of 15 or 16 or 17, I would like to get them out of the schools. I have been troubled from the fact that when I go out to work I have old implements that are worth nothing to use, and I would like this new agent to get some good implements that I may use in working.

WETAN (Assinniboine). I have always remembered everything, and when I don't remember anything I go to the agent. When the hunters killed off all the buffaloes I went to the agent and told him that I wanted money in place of those buffaloes, and instead of doing that, he covered the money in the ground, and then he made a treaty with us. Before he made this treaty there was part of that mineral land was taken away from me, and then I went to the agent and asked for it to be redeemed in money, and he couldn't do it. When I made the other treaty I said "Yes," and I was willing to give it to the commissioners; and when we heard of you coming out here to make a treaty on this mineral land all the Assiniboines agreed they would give it to you, and we told you so yesterday. That is the only thing that we had to depend upon; so when we heard that you was coming out we were willing to sell it, provided that you would give us a ten-year treaty and plenty of cattle. You have said that we do not use that mineral land for anything, but there is plenty of mineral in there to pay for it. I told you that we would like to have some mowing machines to cut the grass; that is what we are depending upon. When they have councils like this it is generally the custom to bring out some grub and give it to these councilmen – sugar, coffee, tea, and crackers – and kill two beef for each tribe, and then they will go around.

LONG KNIFE (Assinniboine). A way back I dressed like these Indians. When I was living among the Indians that is the way I had to live, and that is the way I lived. I lived like the rest of the Indians. And since the buffalo is all destroyed I have been living this way. Your race has been living this way and have lived all this time this way, and you have placed me this way, so I am living this way, and clothed this way. I am glad to see that you have looked so far ahead for me, and see how the future generations shall live. This reservation is about as big as my two thumbs that I hold before you. The Great Father must have plenty of money to raise so many white men as there is. This reservation is about as big as these thumbs, and yet has a little mineral on it and you are asking for it. I told you that I was willing. You see all these Assiniboine before you; they all have one mind; they are all willing to sell, and so I tell you so. By saying that there is plenty of money I mean that I want a ten-year treaty; that is what I want to exchange that mineral land for. You have told us that there is people in Congress that have to consider this agreement, but you go back there and tell them that we said so. On this reservation there is some half-breeds, and we consider them as a part of us, and they are living among us. They have a right to live here, and are living here all right. I am willing to share with them what there is in that warehouse and live with them.

BAD DOG (Assinniboine). I have already said "Yes," yesterday. You asked for this mineral land and I have already given it to you; I want something good for exchange. Ever since you came here I have been full, and I am thankful for it. You are chief man. I want something to eat this evening; I have kind feelings for you. If I ever ask anything of you I want you to give it to me.

OTTER ROSE (Gros Ventre). I want you to know what all these headmen and all the Assinniboines told you yesterday, that we are willing to sell that part of the reservation. I feel good when I see fat people around here. I would like to make a treaty for ten years. All of those Gros Ventres there that have but little sense; they all think the same thing that they did yesterday. I don't want you to mind what those young fellows have said about being poor and starving; they don't know what they are talking about. Children never know what they are talking about. When we made the treaty before they gave us a paper to show the lines of the reservation; I was one of the headmen at the time, and I think I am yet, and I can do as I please with it. I am always hunting the good path. That is all.

THE ASSINNIBOINE (Gros Ventre). I would like to have you men to leave these young men alone; they are not willing to sell. Some of these old Indians that can't do anything, they are willing to sell because they can't work. Those young men say that they don't like to have this land allotted to them. If you give anything to these men that sell this land, you can give it to them, but those fellows that refuse to sell, they don't want anything. You whites try to make us live like the white men, but I don't see why you don't stop those old Indians from having more than one wife.

LITTLE PINE (Gros Ventre). I am glad that you have given me a good agency here to take care of me, and I hope that the new agent will feed me well. I am an Indian and this land belongs to me, and I wish for the agent to take good care of it. I can't sell the reservation; I would like to have it remain as it is.

FIRE STEEL (Gros Ventre). My people have said many different ways, and I don't know which side to go. I don't like to have this reservation fenced outside. I wouldn't like to have the whole reservation fenced. I don't know what to say, and therefore I am not going to say what I am going to do. That is all I can tell you. I don't know if I am going to live long or not; all my flesh is gone.

CUTS THE ROPE (Gros Ventre). This is the first time I have been around this agency. I didn't mean to talk on the subject before you came here, but I am going to tell the commissioners what I think. When I camped over here on Big Peoples Creek I heard that there were three men come here to buy a portion of the reservation, and it come in my head right away that I wanted cattle for it.

SLEEPING BULL (Gros Ventre). You told the truth about our not seeing very far ahead; we can see far enough ahead to let any part of the reservation go. I can't sell it.

THE BRACELETS (Gros Ventre). We think of that mountain like the whites think of the President. We sold a big piece of land already; it was very large, but we think that mountain just as big as that land we sold. I am willing to let those men sell it. I heard a long time ago that the Great Father never beat the Indians in any way when he has anything to do with them, or when he deals with them in any way. The whites always sell their lands and I think it is good, and I trust to the Great Father that you will use me right. I hope that you will carry through everything.

I remember yet what you told me the other day, and I think that you remember what you said. All these people here are accustomed to fence in their land that they cultivate. It looks as if the whites can make these jean

clothes better than they can make the others; I don't see why they don't give us other clothes. As long as I can remember these are the only kind of clothes I got from the Great Father. When we go outside in the heat and in the sun they all fade and turn yellow. The money is wasted in buying these clothes, and I would like to get better clothes. I would like to have a little better rations at the mountains than what we have, and I would like for you to carry through what I have said. I felt good when I heard that you men have come to buy a piece of my land, and I was willing to sell it right away. That is all I have to say.

BIRD HIGH (Gros Ventre). I would sell the reservation – a portion of the land. That is all I have to say.

BLACKFEET (Gros Ventre). I can't say any other way than what I said yesterday; I refused to sell it and I can't say any more. I know it will not go my way because it goes according to the majority. That is all I have to say.

JOHNNY (Gros Ventre). I am sorry to say that I can't sell my reservation.

SITTING BIRD (Gros Ventre). I can't sell any part of the reservation. I like it. I want to know what is the reason these Assinniboines all want to sell. The Assinniboines all want to sell, and they haven't got as much right here as the Gros Ventres.

MR. GRINNELL. I was glad to hear you all say that you didn't want the lands allotted; that you wanted to keep them as a grazing tract for your cattle. I like to hear you all talk that way. You must remember that these cattle now are your living; they have taken the place of the buffalo that raised and supported you in old times. If you men have this thing put in the agreement the Great

Father will never allot you your lands until you ask him to do it yourselves. Then you can keep these lands for your cattle to feed on just as long as you want to. I told you the other day when I talked to you and I tell you now again, when we are talking about paying this price for the land, that we are not the only chiefs; we are servants sent out here to talk to you. If those who sent us, those people who are over us, don't like what we do, don't like the bargain that we make with you, they will throw it away and say, "No; it is no good." Then it will be just as if we hadn't come out here at all.

It would be foolish for us to agree to pay you a price that we are sure the people in Washington wouldn't consent to pay to you; it would be telling you lies; it would be making fools of you; we don't want to do that. This money that we offer to pay you for this small piece of land is a great big pile of money. I know that you can't count money very well, but it is $360,000. That much money, if we had it here in silver dollars, and were to pile it on one end of a plank put across a rock, and then were to drive thirty ponies on the other end, they would just about balance. It would take any of us nearly all winter to count that pile of money if we didn't do anything else. That money, with what it will grow to with the interest, will keep you, I think, for seven years from next summer – for eight years from last July. It will buy lots of food, lots of beef and coffee and sugar and flour; it will give you a lot more cattle than you have got now.

But I don't want you people to think that you are going to be supported by the Government all your lives. I want to see you begin to take care of your cattle, keep them at home, look after them, brand all the calves, and so get lots of cattle. I want to see you take such good care of

your cattle that by the time this eight years is up you won't have to ask for anything of the Government – you won't have to come up to the warehouse and ask for coffee, sugar, bacon, and clothes. If you take care of your cattle and work hard, long before that time you ought to have cattle to sell and money in your pockets, and be able to go to the store and buy all the things that you want out of your own pockets. You have got to turn yourselves into white men; you can't be Indians any longer. If you stay Indians, then you will have to starve. You have got to work and look after your stock. The Great Father doesn't support any white men; they have to work for their own living.

Here are those people that I have just left up here close to the mountains, the Pio gans; they have turned into white men now. They have lots of cattle; they are getting rich; they are getting sense; they are able to trade. I want you to be this same way. Try to remember this. Don't turn your cattle loose; don't let them wander all over the country so that you won't get their calves, but some white man will brand them. Look out for them, keep them at home, and get your own calves and put your own brand on them.

One thing that some of the men said about the young men that are half-breeds and that are here. You said they had your own blood and that you wanted them to share the things that are in the warehouse. That provision, protecting these young men, can be put into the agreement, and will be if you want it.

Now, if you like the things that we have said to you, if you agree to what we have talked, we will have the paper drawn up in the morning, and as many of you as want to

can sign it, or put their marks on it, and we will sign it, and it will go down to Washington to be given to the Great Father there.

We have tried now two mornings to get you to talk to us in the morning, but you don't come; you don't get up very early. But we will be here to-morrow morning and we will have this paper drawn up, and any people that want to put their names to it, any people that want to sign it, can do so. It will be here by 10 o'clock in the morning; then in the afternoon after dinner we will meet you again and read the whole thing to you so that everybody can hear and understand. We will meet here again to-morrow right after dinner, and all through the morning anybody can sign the paper. The headman ought to be the first to sign the appear, but of course the people that get here earliest they will probably sign it first.

Council here adjourned until to-morrow.

Agreement, concluded October 9, 1895, with the Indians of the Fort Belknap Reservation, in Montana, by William C. Pollock, George Bird Grinnell, and Walter M. Clements, commissioners.

This agreement, made and entered into the ninth day of October, A.D. 1895, by and between William C. Pollock, George Bird Grinnell, and Walter Mr. Clements, commissioners, on the part of the United States, and the undersigned Indians, residing upon and attached to the Fort Belknap Indian Reservation, in the State of Montana the same constituting a majority of the male adult Indians belonging upon said reservation, witnessed that –

ARTICLE I.

For and in consideration of the sum to be paid and the obligations assumed on the part of the United States, as hereinafter set forth, said Indians, of the Fort Belknap Reservation, hereby convey, relinquish, and release to the United States all their right, title, and interest in and to that portion of their present reservation, in the State of Montana, lying and being within the following described lines, to wit: Beginning at the 54 miles boundary monument at a point about the middle of the crest of Mission Butte and following a straight line bearing (magnetic) north 17 degrees 30 minutes west to the highest point on a limestone ridge on the south side of the North Fork of Peoples Creek and running at right angles to the course of said creek at this point; thence in a straight line bearing (magnetic) north 2 degrees 45 minutes west to a rounded timbered knob on the crest of the limestone reef on the north side of the North Fork of Peoples Creek and parallel with its general course; thence easterly, following the crest of the last-mentioned limestone reef north of the North Fork of Peoples Creek to a low rounded hill on said limestone reef where it dips down to the valley of Lodge Pole, or Red Mountain Creek; thence in a straight line north 74 degrees east (magnetic) to this wooded limestone ridge known as Travis Butte where a line drawn ~~from the~~ summit of Granite Butte (the peak south of the 61½-mile boundary monument) north 15 degrees east (magnetic) would intersect it; thence along said straight line to the southern boundary line of the present reservation; thence along said southern boundary line of the present reservation to the point of beginning.

ARTICLE II.

For and in consideration of the conveyance, session, and relinquishment hereinbefore made, the United States hereby covenants and agrees to advance and expand during the period of four years, beginning from and after the expiration of the payments provided for in the agreement made between the parties hereto on the eleventh day of February, A.D. eighteen hundred and eighty-seven, and retitled by Congress on the first day of May, A.D. eighteen hundred and eighty-eight, under the direction of the Secretary of the Interior for the Indians, the sum of three hundred and sixty thousand dollars. It is agreed that the said money shall be deposited in the Treasury of the United States immediately upon the expiration of the payments under the said agreement of 1887, to bear interest at the rate of four per centum per annum, and there shall be expended the sum of ninety thousand dollars yearly or so much thereof as may be necessary, the hereinafter provided. It is provided that any surplus accumulated under and remaining at the expiration of payments under the agreement of 1887 shall also bear interest at the rate of four per centum per annum. Such sums, or so much thereof as may be necessary in any one year, shall be expended in the purchase of cows, bulls, and other live stock, goods, clothing, subsistence, agricultural implements, in providing employees, in the education of Indian children, in procuring medicine and medical attention, in the care and support of the aged, sick and infirm, and helpless orphans, in the erection and keeping in repair of such new agency and school buildings, mills, blacksmith, carpenter, and wagon shops as may be necessary in assisting the Indians to build and keep in repair their houses, inclose and irrigate their farms, and in such

other ways as may best promote their civilization and improvement.

ARTICLE III.

It is agreed that the employment of all agency and school employees preference in all cases be given to Indians residing on the reservation, who are well qualified for such positions, and that all cattle issued to said Indians for stock-raising purposes, and their progeny, shall bear the brand of the Indian Department and shall not be sold, exchanged, or slaughtered except by the consent of the agent in charge, until such time as this restriction shall be removed by the Commissioner of Indian affairs.

ARTICLE IV.

In order to encourage habits of industry, and to reward labor, it is further understood and agreed that in the giving out or distribution of cattle or other stock, goods, clothing, subsistence, and agricultural implements, as provided in Article II, preference shall be given to Indians who endeavor by honest labor to support themselves, and especially to those who in good faith undertake the cultivation of the soil, and engage in pastoral pursuits, as a means of obtaining a livelihood, and the distribution of these benefits shall be made from time to time in such manner as shall best promote the objects specified.

ARTICLE V.

As the scarcity of water on this reservation renders the pursuit of agriculture difficult and uncertain, and since the reservation is well adapted to stock raising, and

it seems probable that the main reliance of these Indians for self-support is to be found in cattle raising, it is agreed that during the existence of this agreement no allotments of land in severalty shall be made to them, but that this whole reservation shall continue to be held by these Indians as a communal grazing tract, upon which their herds may feed undisturbed; and that after the expiration of this agreement the land shall continue to be so held until such time as a majority of the adult males of the tribes shall request in writing that allotment in severalty shall be made of their lands; Provided that any member of the tribes may, with the approval of the agent in charge, fence in such area of land as he and the members of his family would be entitled to under the allotment act, and may file with the agent a description of such land and of the improvements that he has made on the same, and the filing of such description shall give the said member of the tribes the right to take such land when allotments of the lands in severalty shall be made.

Article VI.

So soon as this agreement shall have received the approval of Congress, the boundary lines described in Article I shall be surveyed, designated, and marked by monuments not more than one-half miles apart. The expense of such survey shall be borne by the United States, but the unskilled laborers employed in the work shall be hired from among the Indians residing on this reservation.

Such survey and the markings of the above-described boundary lines shall be done immediately – not later than ninety days after the approval of this agreement by

Congress – and completed as speedily as possible, and the ceded portion of the reservation shall not be thrown open to occupancy by the whites until after the new boundaries of the reservation shall have been established and marked.

ARTICLE VII.

It is further agreed and provided that none of the money realized from the sale of this land shall be applied to the payment of any judgment which has been or may hereafter be rendered upon any claim for damages because of depreciations committed by said Indians prior to the date of this agreement.

ARTICLE VIII.

All of the provisions of the agreement between the parties hereto, made February 11th, 1887, not in conflict with the provisions of this agreement, are hereby continued in full force and effect.

ARTICLE IX.

It is understood and declared that wherever the word Indian is used in this agreement it includes mixed bloods as well as full bloods.

ARTICLE X.

This agreement shall not be binding upon either party until ratified by Congress.

Dated and signed at the Fort Belknap Agency, Montana, on the ninth day of October, 1895.

[SEAL.] WILLIAM C. POLLOCK
[SEAL.] GEO. BIRD GRINNELL

ASSINNIBOINE.

[List Of Names Omitted In Printing]

FORT BELKNAP AGENCY MONT.,
October 9, 1895.

We, James Matt, Charles Buckman, Chas. Perry, and James Perry, do certify that the annexed and foregoing agreement by and between the United States and Indians residing upon and attached to the Fort Belknap Indian Reservation, in Montana, was fully interpreted to said Indians and they made to understand the same; that after said interpretation the said Indians, whose names appear subscribed to said agreement, signed the same in our presence.

We further certify that said Indians are members of said tribes and reside upon said reservation, set apart for said Indians in Montana, and that said subscribers are male adults over the age of 21 years.

Given under our hand, at the Fort Belknap Agency, this 9th day of October, 1895.

CHARLES PERRY.
CHARLIE BUCKMAN,
JAMES MATT,
JAMES PERRY.

FORT BELKNAP AGENCY, MONT.,
October 9, 1895.

I hereby certify that there were 181 male adult Assinniboine and 153 male adult Gros Ventre Indians, making a total of 334 male adult Indians residing on this

reservation and drawing rations and annuities at this agency, as shown by the records of the agency office.

LUKE C. HAYS,
United States Indian Agent.

REPORT.

The Fort Belknap Indian Reservation extends south from the Milk River to the watershed of the Little Rocky Mountains, separating the waters of the Milk from those of the Missouri River. The only available timber on the reservation is found in this mountainous part of the reservation, and the only waters available for irrigation have their source in these mountains.

The mountainous area may be roughly classified into two portions – the limestone area, on which all the useful timber is found, and the central region of porphyry, which is covered by scrubby pines and brush, none of which is useful for timber. This porphyry area is the numeral-bearing port of the mountains.

The area which it is desired shall be cut off from the reservation is this central, porphyry region. It includes the higher peaks and head-water gulches of the streams. The miners, as represented by their delegates, do not desire to include any timber land or acquire water rights, but simply to have the mineral zone separated from the reservation.

A careful examination of this area shows that the larger part of the mineral-bearing country lies within the boundaries of the reservation. A large number of prospects have been found north of the watershed (boundary line), from which I have collected specimens of ore showing free

gold and that show very promising lodges of ore. One prospect has been worked at times, although within the reservation. A shaft 65 feet deep has been sunk and a tunnel run in to meet it. The ore from this shaft was shipped and yielded $32,000 to the owners. A number of claims located upon the divide show lodes running across the ridges, the greater part of the lead being on the reservation. Examples of this occur south of Mission Butte, at the west end, and on the divide near Shellrock Mountain to the east.

The placer deposits occurring within the limits of the reserve are not of any great extent or value. In no case have any of the placers yielded more than very small returns, the miners barely making wages, if that much.

After careful examination of the ground, going over the country to note mineral character, timber, and water, I am convinced that the mineral deposits are sufficient extent and importance to warrant the cutting off of a portion of the mountain part of the reservation. The following limits would reserve to the Indians all the available timber and at the same time free the mineral-bearing area:

Starting from the summit of Mission Butte, at the 54-mile monument of the reservation boundary, due north to the south bank of the Northern Fork of People's Creek; thence up the south bank of the stream to the divide between this creek and Lodge Pole Creek; thence from this divide N.E. 55° (mag.) to this intersection of a line drawn N.E. 20° from the summit of Granite Butte (61-mile monument). This area would include about 35 square miles, as near as can be estimated with the data at hand, all of which is mineral-bearing or likely to prove so. This

area includes but a few acres of timber, being mainly covered by young pines of 2 feet to 5 feet in height. It includes no land capable of cultivation. The limits desired by the prospectors generally are defined by the limestone reef that encircles the porphyry. While forming a natural boundary, this is one difficult of precise definition, and is, moreover, open to objection, as there are two small isolated patches of limestone within the porphyry area and one butte of porphyry within the main limestone area.

BOUNDARIES OF PROPOSED AREA TO BE CUT OFF.

The limits as defined in the last paragraph, while satisfactory to those desiring the cutting off of the reservation, are open to a critical objection, inasmuch as they do not include the "contact" zone between the limestone and the porphyry. Therefore, a better boundary, so far as the future is concerned, would be obtained by drawing a line from the summit of Mission Butte (54-mile boundary monument) due north to the intersection of the limestone "rim" or "reef" lying north of the north branch of Peoples Creek (the stream joining the main creek a half mile above St. Paul's mission). Thence follow the limestone reef to a point N. 15° E. magnetic from the summit of the peak known as Granite Butte (the peak south of the 61½-mile boundary monument). This will include all the mineral-bearing porphyry area and the contact zone, and will exclude all timber lands.

Respectfully submitted,

WALTER H. WEED,
Geological, United States Geological Survey.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, January 20, 1896.

SIR: I have the honor to acknowledge the receipt of your letter of January 13, 1896, directing this office to report, in duplicate, as to the manner in which the ceded lands of the Blackfeet and the Fort Belknap Indians should be disposed of, and also to submit drafts of items or sections to be added to the bills submitted to you by the honorable Commissioner of Indian Affairs.

With his report (in triplicate) of January 11, 1896, relative to the negotiations with the Blackfeet Indians the Commissioner of Indian Affairs includes duplicate copies of the report of the commissioners appointed to treat with these Indians, dated December 14, 1895, duplicate copies of the proceedings of councils, duplicate copies of an agreement entered into, and duplicate copies of a bill incorporating this agreement, ratifying the same, and providing for the survey of the lands agreed upon to be ceded to the United States.

With his report of the same date relative to the negotiations with the Fort Belknap Indians the Commissioner of Indian Affairs includes similar papers, together with a report by Walter H. Weed, geologist, United States Geological Survey.

I have carefully examined the various documents, and have reached the conclusion that the lands covered by each bill are valueless for other than mining purposes and that they should be made subject to disposal under the mineral-land laws only.

Inasmuch as the commission estimates the area of the lands to be surrendered by the Blackfeet Indians as

800,000 acres and fixes $1,500,000 as the sum to be paid therefor, the prices per acre established by sections 2325, 2333, and 2337, United States Revised Statutes, for the sale of mineral lands, will be amply sufficient when these lands are sold to reimburse the Government for the gross sum paid the Indians.

The area of the lands to be ceded by the Belknap Indians is estimated at 40,000 acres, and the amount to be paid therefor is fixed at $360,000. Accordingly the price per acre at which these lands should be sold to miners should be placed at $10 per acre.

I have the honor to submit the following sections as additional to the proposed bills:

BLACKFEET INDIAN RESERVATION.

A BILL to ratify an agreement, etc.

SEC. 3. That upon the filing in the United States local land office for the district in which the lands surrounded by article one of the foregoing agreement are situated of the approved plat of survey authorized by section two of this act the lands so surrendered shall be open to occupation, location, and purchase under the provisions of the mineral-land laws only, subject to the several articles of the foregoing agreement: *Provided*, That the terms of this section shall not be construed to authorize occupancy of said lands for mining purposes prior to the date of filing said approved plat of survey.

BELKNAP INDIAN RESERVATION.

A BILL to ratify an agreement, etc.

SEC. 3. That upon the filing in the United States local land office for the district in which the lands surrounded by article one of the foregoing agreement are situated of the approved plat of survey authorized by section two of this act the lands so surrendered shall be open to occupation, location, and purchase under the provisions of the mineral-land laws only, subject to the several articles of the foregoing agreement: *Provided*, That said lands shall be sold at ten dollars per acre: *And provided further*, That the terms of this section shall not be construed to authorize the occupancy of said lands for mining purposes prior to the date of filing said approved plat of survey.

The papers transmitted with your letter are herewith returned.

Very respectfully,

S. W. LAMOREUX, *Commissioner.*

THE SECRETARY OF THE INTERIOR

A BILL to ratify an agreement with the Indians of the Fort Belknap Reservation, Montana, and making appropriations to carry the same into effect.

Whereas William C. Pollock, George Bird Grinnell, and Walter M. Clements, commissioners on the part of the United States, did on the ninth day of October, A.D. eighteen hundred and ninety-five, conclude an agreement with the Indians of the Fort Belknap Reservation in the State of Montana, which said agreement is in words and figures as follows, to wit:

Agreement concluded October ninth, 1895, with the Indians of the Fort Belknap Reservation in Montana, by William C. Pollock, George Bird Grinnell, and Walter M. Clements, commissioners.

This agreement made and entered into this ninth day of October, A.D. 1895, by and between William C. Pollock, George Bird Grinnell, and Walter M. Clements, commissioners on the part of the United States, and the undersigned Indians, residing upon and attached to the Fort Belknap Indian Reservation in the State of Montana, the same constituting a majority of the male adult Indians belonging upon said reservation, witnesseth that,

ARTICLE I.

For and in consideration of the sum to be paid and the obligations assumed on the part of the United States, as hereinafter set forth, said Indians of the Fort Belknap Reservation hereby convey, relinquish, and release to the United States all their right, title, and interest in and to that portion of their present reservation, in the State of Montana, lying and being within the following-described lines, to wit: Beginning at the 54-mile boundary monument, at a point about the middle of the crest of Mission Butte, and following a straight line, bearing (magnetic) north 17 degrees 30 minutes west, to the highest point on a limestone ridge on the south side of the north fork of People's Creek, and running at right angles to the course of said creek at this point; thence in a straight line, bearing (magnetic) north 2 degrees 45 minutes west, to a rounded, timbered knob on the crest of the limestone reef on the north side of the north fork of People's Creek, and parallel with its general course; thence easterly, following the crest of the last-mentioned limestone reef north of the

north fork of People's Creek, to a low rounded hill on said limestone reef, where it dips down to the valley of Lodge Pole, or Red Mountain Creek; thence in a straight line north 74 degrees east (magnetic), to the wooded limestone ridge known as Travois Butte, where a line drawn from the summit of Granite Butte (the peak south of the 61½-mile boundary monument) north 15 degrees east (magnetic) would intersect it; thence along said straight line to the southern boundary line of the present reservation; thence along said southern boundary line of the present reservation to the point of beginning.

ARTICLE II.

For and in consideration of the conveyance, cession, and relinquishment hereinbefore made, the United States hereby covenants and agrees to advance and expend during the period of four years, beginning from and after the expiration of the payments provided for in the agreement made between the parties hereto on the eleventh day of February, A.D. eighteen hundred and eighty-seven, and ratified by Congress on the first day of May, A.D. eighteen hundred and eighty-eight, under the direction of the Secretary of the Interior for the Indians, the sum of three hundred and sixty thousand dollars. It is agreed that the said money shall be deposited in the Treasury of the United States immediately upon the expiration of the payments under the said agreement of 1887, to bear interest at the rate of four per centum per annum, and there shall be expended the sum of ninety thousand dollars yearly, or so much thereof as may be necessary, as hereinafter provided. It is provided that any surplus accumulated under and remaining at the expiration of

payments under the agreement of 1887 shall also bear interest at the rate of four per centum per annum

Such sums, or so much thereof as may be necessary in any one year, shall be expanded in the purchase of cows, bulls, and other live stock, goods, clothing, subsistence, agricultural implements; in providing employees, in the education of Indian children, in procuring medicine and medical attendance, in the care and support of the aged, sick, and infirm, and helpless orphans; in the erection and keeping in repair of such new agency and school buildings, mills, blacksmith, carpenter and wagon shops, as may be necessary; in assisting the Indians to build and keep in repair their houses, enclose and irrigate their farms, and in such other ways as may best promote their civilization and improvement.

ARTICLE III.

It is agreed that in the employment of all agency and school employees preference in all cases be given to Indians residing on the reservation, who are well qualified for such positions, and that all cattle issued to said Indians for stock-raising purposes, and their progeny, shall bear the brand of the Indian Department, and shall not be sold, exchanged, or slaughtered except by the consent of the agent in charge, until such time as this restriction shall be removed by the Commissioner of Indian Affairs.

ARTICLE IV.

In order to encourage habits of industry and to reward labor, it is further understood and agreed that in the giving out or distribution of cattle or other stock, goods, clothing, subsistence, and agricultural implements, as

provided in Article II, preference shall be given to Indians who endeavor by honest labor to support themselves, and especially to those who in good faith undertake the cultivation of the soil and engage in pastoral pursuits as a means of obtaining a livelihood, and the distribution of these benefits shall be made from time to time in such manner as shall best promote the objects specified.

ARTICLE V.

As the scarcity of water on this reservation renders the pursuit of agriculture difficult and uncertain, and since the reservation is well adapted to stock raising, and it seems probable that the main reliance of these Indians for self-support is to be found in cattle raising, it is agreed that during the existence of this agreement no allotments of land in severalty shall be made to them, but that this whole reservation shall continue to be held by these Indians as a communal grazing tract, upon which their herds may feed undisturbed; and that after the expiration of this agreement the land shall continue to be so held until such time as a majority of the adult males of the tribes shall request in writing that allotment in severalty shall be made of their lands: Provided, that any member of the tribes may, with the approval of the agent in charge, fence in such area of land as he and the members of his family would be entitled to under the allotment act, and may file with the agent a description of such land and of the improvements that he has made on the same, and the filing of such description shall give the said member of the tribes the right to take such land when allotments of the lands in severalty shall be made.

ARTICLE VI.

So soon as this agreement shall have received the approval of Congress, the boundary lines described in Article I shall be surveyed, designated, and marked by monuments not more than one-half mile apart. The expense of such survey shall be borne by the United States, but the unskilled laborers employed in the work shall be hired from among the Indians residing on this reservation.

Such survey and the markings of the above-described boundary lines shall be done immediately – not later than ninety days after the approval of this agreement by Congress – and completed as speedily as possible, and the ceded portion of the reservation shall not be thrown open to occupancy by the whites until after the new boundaries of the reservation shall have been established and marked.

ARTICLE VII.

It is further agreed and provided that none of the money realized from the sale of this land shall be applied to the payment of any judgment which has been or may hereafter be rendered upon any claim for damages because of depreciations committed by said Indians prior to the date of this agreement.

ARTICLE VIII.

All of the provisions of the agreement between the parties hereto, made February 11th, 1887, not in conflict with the provisions of this agreement, are hereby continued in full force and effect.

ARTICLE IX.

It is understood and declared that wherever the word Indian is used in this agreement it includes mixed bloods as well as full bloods.

ARTICLE X.

This agreement shall not be binding upon either party until ratified by Congress.

Dated and signed at the Fort Belknap Agency, Montana, on the ninth day of October, 1895.

[SEAL.] WILLIAM C. POLLOCK
[SEAL.] GEO. BIRD GRINNELL

ASSINNIBOINE.

[List Of Names Omitted In Printing]

FORT BELKNAP AGENCY MONT., *October 9, 1895.*

We, James Matt, Charles Buckman, Chas. Perry, and James Perry, do certify that the annexed and foregoing agreement by and between the United States and Indians residing upon and attached to the Fort Belknap Indian Reservation, in Montana, was fully interpreted to said Indians and they made to understand the same; that after said interpretation the said Indians, whose name appear subscribed to said agreement, signed the same in our presence.

We further certify that said Indians are members of said tribes and reside upon said reservation, set apart for said Indians in Montana, and that said subscribers are male adults over the age of 21 years.

Given under our hand at the Fort Belknap Agency this 9th day of October, 1895.

CHARLES PERRY,
CHARLIE BUCKMAN,
JAMES MATT,
JAMES PERRY.

FORT BELKNAP AGENCY MONT., *October 9, 1895.*

I hereby certify that there are 181 male adult Assiniboine and 153 male adult Gros Ventre Indians, making a total of 334 male adult Indians residing on this reservation and drawing rations and annuities at this agency, as shown by the records of the agency office.

LUHR C. HAYS,
United States Indian Agent.

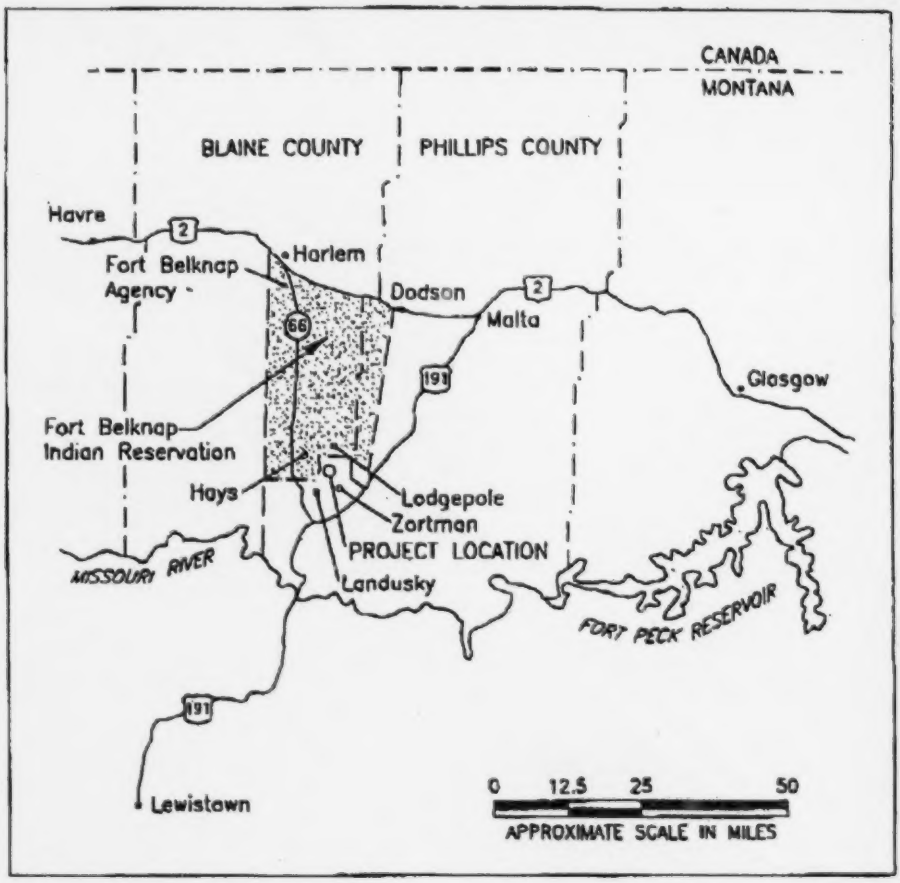
Therefore,

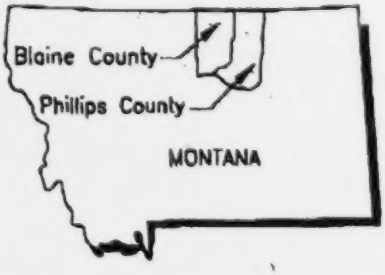
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreement be, and the same is hereby, accepted, ratified, and confirmed.

SEC. 2. That for the purpose of making the survey of the boundary lines described in article and as provided for by article six of said agreement, there be and hereby is appropriated out of any moneys in the Treasury not otherwise appropriated the sum of one thousand five hundred dollars, or so much thereof as may be necessary, the same to be immediately available.

SEC. 3. That upon the filing in the United States local land office for the district in which the lands surrendered by article one of the foregoing agreement are situated, of the approved plat of survey authorized by section two of this act, the lands so surrendered shall be open to occupation, location, and purchase, under the provisions of

the mineral-land laws only, subject to the several articles of the foregoing agreement: *Provided*, That said lands shall be sold at ten dollars per acre: *and provided further*, That the terms of this section shall not be construed to authorize the occupancy of said lands for mining purposes prior to date of filing said approved plat of survey.





SOURCE: DSL/BLM 1990.

LOCATION OF ZORTMAN
AND
LANDUSKY MINE EXPANSIONS

FIG. 42

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(2)

Supreme Court, U.S.
FILED
AUG 20 2007
OFFICE OF THE CLERK

No. 06-1672

In the Supreme Court of the United States

GROS VENTRE TRIBE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
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Counsel of Record
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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioner Indian Tribes did not possess a claim for breach of trust against the United States, arising out of a federal agency's management of third-party mining activity on non-tribal land located off the Tribes' reservation.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 469 F.3d 801. The opinion of the district court (Pet. App. 40-58) is reported at 344 F. Supp. 2d 1221. A prior opinion of the district court (Pet. App. 28-39) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 2006. A petition for rehearing was denied on March 16, 2007 (Pet. App. 59). The petition for a writ of certiorari was filed on June 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Gros Ventre Tribe and Assiniboine Tribe (collectively, the Tribes) reside on the Fort Bel-

knap Indian Reservation in north-central Montana. Pet. App. 3. From 1979 until it declared bankruptcy and ceased operations in 1998, Pegasus Gold Corporation (Pegasus) and its wholly owned subsidiary Zortman Mining, Inc. (ZMI) operated two gold mines, known as the Zortman and Landusky mines, in the Little Rocky Mountains of north-central Montana. *Id.* at 5-6, 28-29. A portion of the Little Rocky Mountains was once located within the Fort Belknap Indian Reservation, but the land was sold and ceded to the federal government by the Tribes in the late 1800s for the purpose of allowing gold mining. *Id.* at 4, 29, 42. The Zortman and Landusky mines are situated partly on federal and partly on private land. *Id.* at 28, 42. The mines are not located within the Fort Belknap Indian Reservation but are near its southern boundary. *Id.* at 5, 29, 42-43.

In 1992, ZMI submitted a plan for an expansion of the Zortman mine. Pet. App. 6. The federal Bureau of Land Management (BLM) decided to prepare an environmental impact statement (EIS) to evaluate the expansion proposal. *Id.* at 29. In the course of reviewing the proposal, BLM and the Montana Department of State Lands (DSL) determined that acid rock drainage (ARD) had become widespread at both the Zortman and Landusky mines. *Id.* at 6, 29.[1] In light of the ARD problem, BLM ordered ZMI to submit modified plans of operations for both mines. *Id.* at 29. In 1994, BLM de-

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[1] "ARD occurs when rock containing sulfides is exposed to air and water during mining operations. The water becomes acidic, sometimes containing metals such as lead, arsenic, zinc, copper, and silver." Pet. App. 6 n.2. In 1996, petitioners, the United States, and others entered into a consent decree settling federal Clean Water Act lawsuits "relating to the discharge of mine drainage and other mine wastewaters" at or from the Zortman and Landusky mines. *Id.* at 31.

cided to enlarge the scope of the expansion EIS to include mine expansion and reclamation requirements at both operations. *Id.* at 30.

In 1996, after completing an EIS, BLM and the Montana Department of Environmental Quality (DEQ), a successor agency to DSL, issued a record of decision (ROD). Pet. App. 6 & n.3, 44. The 1996 ROD approved expanded operations at both mines, and it required the implementation of reclamation plans, including specific measures to control the development of ARD. *Ibid.*; Supp. C.A. E.R. 63, 82-99, 100, 101-102.[2] In late 1996,the Tribes (and other groups) appealed BLM's decision to the Interior Board of Land Appeals (IBLA). Pet. App. 6, 31; see *Island Mountain Protectors*, 144 I.B.L.A. 168 (1998). IBLA stayed BLM's decision pending disposition of the administrative appeal. See *id.* at 170.

In 1998, while the Tribes' administrative appeal was pending before IBLA, ZMI and Pegasus declared bankruptcy. Pet. App. 6, 44. The companies abandoned their plans to expand the mines and announced that they would close and reclaim the mines instead. *Id.* at 6. In May 1998, IBLA issued a decision on the Tribes' administrative appeal. *Ibid.* IBLA concluded, *inter alia*, that in approving the 1996 ROD, "BLM did not fully observe its trust responsibility to the Tribes." *Island Mountain Protectors*, 144 I.B.L.A. at 203. The 1996 ROD was vacated in part and remanded to BLM. *Ibid.*

In June 1998, BLM issued a second ROD in response to the companies' bankruptcy filing. Pet. App. 6, 32. The 1998 ROD required reclamation of existing distur-

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[2] "Supp. C.A. E.R." refers to the supplemental excerpts of record filed by the United States in the court of appeals.

bances using mitigation measures developed by BLM. *Id.* at 6; see *id.* at 32. However, because BLM had relied on the 1996 EIS in preparing the 1998 ROD, IBLA vacated the 1998 ROD on the same ground that it had vacated the 1996 ROD. *Id.* at 6-7, 32.

In response to IBLA's decision, BLM and DEQ consulted with the Tribes concerning reclamation of the Zortman and Landusky mines. Pet. App. 7, 32. In 2001, pursuant to that consultation, BLM and DEQ prepared a supplemental EIS (SEIS), which examined six reclamation alternatives for each mine. *Id.* at 7, 44. In May 2002, based on the SEIS, BLM issued a new ROD. *Ibid.* The reclamation alternative selected for each mine was chosen in part because it "place[s] only the relatively non acid-generating waste rock as backfill in the mine pits, and leave[s] the most strongly acid-generating waste rock on the lined leach pads where any leachate will be easier to control and treat." Supp. C.A. E.R. 60.[3]

2. In April 2000 (*i.e.*, prior to the issuance of the SEIS and new ROD), the Tribes filed suit in federal district court seeking declaratory, injunctive, and mandamus relief against the United States, BLM, and other federal agencies. Pet. App. 7-8, 28, 32-33, 45.[4] Their

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[3] The Tribes appealed the SEIS and 2002 ROD to IBLA. While the instant case was pending before the court of appeals, IBLA dismissed the Tribes' administrative appeal as moot. Pet. App. 9 n.4. IBLA concluded that the administrative appeal was moot because, "given the nature of, and authority under which, the 2002 ROD was issued and the mine operator's discharge in bankruptcy, there is no longer any effective relief the Board may grant, nor are the issues raised capable of repetition yet evading review." *Assiniboine & Gros Ventre Tribes*, IBLA No. 2002-444 (June 22, 2006), slip op. 13-14 (unreported order). The Tribes did not challenge the 2002 ROD in court. Pet. App. 33.

[4] Petitioner Fort Belknap Indian Community Council, the Tribes' governing body, was also a plaintiff in the district court. The Bureau of

complaint alleged that the federal government had breached a trust responsibility to the Tribes by approving, permitting, and failing to reclaim the Zortman and Landusky mines, the operation of which allegedly had diminished and continues to diminish the quality and quantity of water available to the Tribes. *Id.* at 7; see *id.* at 32-33, 44-45.

In its initial decision, the district court granted summary judgment in favor of the United States. Pet. App. 28-39. The court explained that, "[w]hile the Tribes have challenged the BLM's 1996 EIS and ROD, those decisions were vacated by the IBLA, and have been supplemented by the 2002 SEIS and ROD." *Id.* at 38. Because "the only remedy for a defective EIS has already been undertaken by the BLM in the form of the 2002 SEIS," the court concluded, "[r]eviewing the earlier decisions without reviewing the decision supplementing those decisions would be a futile exercise." *Ibid.*

In response to the Tribes' motion to alter or amend the judgment, the district court issued a second decision, which held that summary judgment in favor of the United States was warranted because the court lacked subject matter jurisdiction over the Tribes' claim. Pet. App. 40-58. The court explained that its jurisdiction over the Tribes' breach of trust claim "must rest upon the challenged action being a 'final agency action'" within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. 704. Pet. App. 46.[3] Applying the "final

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Indian Affairs and the Indian Health Service, respondents in this Court, were named as additional defendants in the district court. Pet. ii; Pet. App. 28.

[3] Section 704 provides in relevant part that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." A different

agency action" requirement to the Tribes' breach of trust claim, the court found that the only such contested action falling within the six-year statute of limitations in 28 U.S.C. 2401(a) was the vacated 1996 ROD. See Pet. App. 54. The court held that the Tribes lacked standing to challenge the 1996 ROD because that decision was never implemented and therefore did not cause any injury to the Tribes. *Id.* at 54-55.

As an alternative ground for its decision, the district court held that the Tribes had failed to identify with sufficient specificity any statutory obligation breached by the government. Pet. App. 48-53. The court explained that, "[i]n the absence of a specific duty, or specific control over tribal property, the government fulfills its obligations as a trustee for the Tribes if it complies with applicable statutes." *Id.* at 48 (citing *Morongo Band of Mission Indians* v. *FAA*, 161 F.3d 569, 574 (9th Cir. 1998) (*Morongo Band*)). The court noted that the Tribes' only statutory challenge was "brought under [5 U.S.C.] 706(1) for failure to act to prevent undue degradation of tribal lands." *Id.* at 51. The court further observed that "[t]he requirements for 'failure-to-act'

APA provision, 5 U.S.C. 702, states that "[a]n action in a court of the United States seeking relief other than money damages * * * shall not be dismissed * * * on the ground that it is against the United States." In the instant case, the district court concluded:

> [B]ecause the APA waives the government's sovereign immunity, the APA establishes the necessary prerequisites to the court's jurisdiction. "[T]he terms of [the government's] consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). Judicial review under § 702 is expressly conditioned, under § 704, on the existence of a "final" agency action.

Pet. App. 47.

claims have recently been clarified by" this Court in *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) (*SUWA*), and that, under *SUWA*, "the act sought to be compelled under [Section] 706(1) must be a specific, discrete action that is legally required." Pet. App. 51. The court concluded that petitioners had identified no such action here. *Id.* at 52-53.

3. The court of appeals affirmed. Pet. App. 1-27. The court concluded:

> Nothing within any of the statutes or treaties cited by the Tribes imposes a specific duty on the government to manage non-tribal resources for the benefit of the Tribes. Because the Tribes do not have a common law claim for breach of trust—i.e., one that can be raised independently of any applicable statutes or regulations—the Tribes are forced to rely on the APA for a private right of action. In applying the APA to the Tribes' claims, the district court properly concluded that the Tribes did not have standing to challenge the vacated 1996 EIS or ROD. Moreover, the Tribes did not have a cognizable failure to act claim because the Tribes could not assert that the government has failed to take a discrete agency action that it is legally required to take. Therefore, the district court correctly dismissed the Tribes' claims for lack of jurisdiction.

Id. at 26-27.

The court of appeals identified a conflict in Ninth Circuit case law on the question whether 5 U.S.C. 702's waiver of sovereign immunity for non-monetary suits is subject to the "final agency action" requirement of 5 U.S.C. 704. Pet. App. 11; see *id.* at 12-14 (discussing *Gallo Cattle Co.* v. *USDA*, 159 F.3d 1194 (9th Cir. 1998),

and *Presbyterian Church (U.S.A.)* v. *United States*, 870 F.2d 518 (9th Cir. 1989)). The court determined, however, that en banc resolution of that conflict was unnecessary because, even if 5 U.S.C. 702 did waive the United States' sovereign immunity in the absence of "final agency action," "the Tribes do not have a common law cause of action for breach of trust." Pet. App. 14; see *id.* at 11 (stating that the intra-circuit conflict need not be resolved in this case "as we affirm the district court on its alternative holding").

Consistent with the district court's analysis, the court of appeals explained that, "unless there is a specific duty that has been placed on the government with respect to Indians, [the government's general trust obligation] is discharged by [the government's] compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." Pet. App. 16 (quoting *Morongo Band*, 161 F.3d at 574). The court noted that "[h]ere, the Tribes cite the Treaty of Fort Laramie, the Treaty with the Blackfeet, and the Grinnell Agreement as instances where the government has committed itself to specific fiduciary obligations in the management of water resources existing off of the Reservation." *Id.* at 20; see pp. 13-16, *infra* (discussing Treaties and Grinnell Agreement). The court examined those materials and concluded that they did not constitute a commitment by the government "to manage off-Reservation resources for the benefit of the Tribes." *Ibid.* "Rather," the court concluded, "at most, the treaties merely recognize a general or limited trust obligation to protect the Indians against depredations on Reservation lands: an obligation for which we have no way of measuring whether the government is in compliance, unless we look

to other generally applicable statutes or regulations." *Id.* at 20-21.

Relying on this Court's decision in *SIWA*, the court of appeals also held that "the district court properly dismissed the Tribes' 'failure to act' claim for lack of jurisdiction." Pet. App. 24. The court noted that the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, on which the Tribes relied, "is primarily procedural in nature, and it does not provide a private right of action." Pet. App. 23. The court concluded that, "[e]ven assuming that the government has a common law trust obligation that can be tied to its statutorily mandated duties under FLPMA, the Tribes have no basis for arguing that these obligations require the government to take discrete nondiscretionary actions." *Id.* at 24.

ARGUMENT

1. Petitioners seek this Court's review of the question whether the waiver of sovereign immunity contained in 5 U.S.C. 702 is limited by the "final agency action" requirement of 5 U.S.C. 704. See Pet. 15-19. The instant case would be an unsuitable vehicle for resolving that question, however, because the court of appeals explicitly reserved the issue and decided the case on other grounds. See Pet. App. 11-14. While acknowledging that an intra-circuit conflict existed with respect to the interplay between 5 U.S.C. 702 and 704, see Pet. App. 12-14, the court concluded that it "need not make a sua sponte en banc call to resolve this conflict because * * * the Tribes do not have a common law cause of action for breach of trust" under the circumstances presented here, *id.* at 14. In light of the court of appeals' disposition of this case, the question whether the Tribes'

failure to identify a reviewable "final agency action" provided an *additional* ground for dismissal of their suit does not warrant this Court's review.[6]

2. Petitioners contend (Pet. 20-29) that the court of appeals, in rejecting the Tribes' breach of trust claims for equitable relief, erred by applying principles articulated by this Court in tribal suits for money damages. The court of appeals' ruling is correct and does not warrant this Court's review.

a. In *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), this Court addressed Indian allottees' claims for damages under the Indian Tucker Act, 28 U.S.C. 1505. See 445 U.S. at 537, 538-539. The Court concluded that the Indian General Allotment Act, 25 U.S.C. 331 *et seq.*, "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources." 445 U.S. at 542. The Court explained, *inter alia*, that the General Allotment Act "does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." *Ibid.* After further proceedings on remand, however, the Court concluded that, unlike the General Allotment Act, the additional statutes and regulations on which the plaintiff allottees relied

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[6] The position of the United States is that 5 U.S.C. 702 waives the government's sovereign immunity only in actions brought under the APA, and that the waiver is therefore subject to the limitations imposed by other APA provisions, including the "final agency action" requirement contained in 5 U.S.C. 704. The bases for that position are set forth in the government's brief in opposition (at 4-7) to the petition for a writ of certiorari in *Sample* v. *Miles*, No. 06-11003 (filed Apr. 23, 2007), which is currently pending before the Court. We have provided petitioners' counsel with a copy of the government's brief in opposition in *Sample*.

"clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians." *United States* v. *Mitchell*, 463 U.S. 206, 224 (1983) (*Mitchell II*). The Court in *Mitchell II* further concluded that those sources of law "can fairly be interpreted as mandating compensation by the Federal Government for violations of its fiduciary responsibilities in the management of Indian property." *Id.* at 228.

This Court recently summarized the governing principles as follows:

> To state a claim cognizable under the Indian Tucker Act, *Mitchell I* and *Mitchell II* thus instruct, a Tribe must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties. If that threshold is passed, the court must then determine whether the relevant source of substantive law can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes.

United States v. *Navajo Nation*, 537 U.S. 488, 506 (2003) (brackets, citations, and internal quotation marks omitted); see *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 473-474 (2003). Because petitioners' current suit is for equitable rather than monetary relief, the second prong of that two-part test is inapplicable here—*i.e.*, petitioners were not required to identify a source of substantive law that mandates *compensation* for breach of the government's trust responsibilities. The nature of the relief sought, however, provides no basis for dispensing with the antecedent requirement that petitioners "identify a substantive source of law that establishes specific fiduciary or other duties." *Na-*

vajo Nation, 537 U.S. at 506. The importance of identifying a source of law imposing specific trust responsibilities is particularly great in the present case, since the activities at issue here have occured *outside* of tribal land, and petitioners seek to compel the government "to regulate third-party use of non-Indian resources for the benefit of the Tribes." Pet. App. 21.

b. Petitioners contend (Pet. 23) that, insofar as the court of appeals applied *Mitchell I* and its progeny to the Tribes' claims for equitable relief, its decision conflicts with *Blue Legs* v. *United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989), and *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370 (1st Cir. 1975). Petitioners' reliance on those decisions is misplaced.

In *Blue Legs*, the district court found that two federal agencies had "contributed to open dumping on the Reservation by generating solid waste, contracting for its disposal and, in some instances, transporting solid waste to dumps operated in violation of federal law." 867 F.2d at 1099. Based on that finding, the court of appeals held that the agencies were required by the Resource Conservation and Recovery Act to undertake court-ordered remedial efforts. See *id.* at 1098-1100. Although the Eighth Circuit also stated that the agencies' "duty to clean up the dumps [wa]s buttressed by the existence of the general trust relationship between these agencies and the Tribe," *id.* at 1100, the equitable relief ordered in that case was firmly grounded in federal statutory law.

Because the decision in *Joint Tribal Council* predated *Mitchell I*, the First Circuit in that case had no opportunity to discuss the proper understanding of *Mitchell I* and its progeny. The First Circuit's decision,

however, is consistent with this Court's later holdings and with the court of appeals' analysis in the instant case. The court in *Joint Tribal Council* agreed with the State of Maine that "[a] fiduciary relationship in this context must * * * be based upon a specific statute, treaty or agreement which helps define and, in some cases, limit the relevant duties." 528 F.2d at 379. The court held, however, that the Nonintercourse Act, 25 U.S.C. 177, "is such a statute" because it "imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe covered by the Act." 528 F.2d at 379.

Thus, the courts in both *Blue Legs* and *Joint Tribal Council* looked to relevant sources of positive law in determining the nature and extent of the federal government's fiduciary obligations. Neither of those decisions, moreover, suggested that the federal government has a trust responsibility to manage *non-tribal* lands to serve the interests of the Tribes. The decisions in *Blue Legs* and *Joint Tribal Council* therefore do not conflict with the Ninth Circuit's ruling here.

c. Petitioners contend (Pet. 24-26) that the court of appeals misconstrued treaties and agreements between the federal government and the Tribes. In the court of appeals, petitioners relied on the Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749 (Pet. App. 61-68); the Treaty with the Blackfoot Indians, Oct. 17, 1855, 11 Stat. 657 (Pet. App. 69-78), also referred to as the Treaty with the Blackfeet (Pet. App. 69); and an Agreement with the Indians of the Fort Belknap Indian Reservation in Montana, Oct. 9, 1895, 29 Stat. 350 (Pet. App. 90-97), also referred to as the Grinnell Agreement. Pet. App. 4. Petitioners argued below that those documents were "instances where the government has committed

itself to specific fiduciary obligations in the management of water resources existing off of the Reservation." *Id.* at 20. The petition for a writ of certiorari offers no analysis of the language of those documents, however, nor do petitioners contend that any circuit conflict exists regarding the proper construction of the pertinent treaties and agreement. Further review is not warranted.

In Article 3 of the Treaty of Fort Laramie, the United States agreed to protect the petitioner Tribes "against the commission of all depredations by the people of the said United States, after the ratification of this treaty." Pet. App. 62. In Article 7 of the Treaty with the Blackfeet, 11 Stat. 658, the United States similarly agreed to protect the Tribes "against depredations and other unlawful acts which white men residing in or passing through their country may commit." Pet. App. 72. The court of appeals construed those treaties as expressing the United States' promise "to protect the Tribes from depredations that occurred only on tribal land." *Id.* at 22.

Petitioners offer no textual basis for rejecting that interpretation of the treaties.[7] Nor do petitioners iden-

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[7] The duty assumed by the government in the Treaty with the Blackfeet is expressly limited to the prevention of "depredations and other unlawful acts which white men *residing in or passing through [the Tribes'] country* may commit." Pet. App. 72 (emphasis added). Under Article 3 of the Treaty of Fort Laramie, the government's obligation to prevent "depredations" is not explicitly confined to acts occurring on tribal land. See Pet. App. 62. The government's promise to perform that protective function, however, was made in return for the Tribes' "recogni[tion]," in Article 2 of the treaty, of "the right of the United States Government to establish roads, military and other posts, within [the Tribes'] respective territories." Pet. App. 62. Read in con-

tify a contemporaneous understanding of the word "depredations" that would encompass the adverse impacts on water resources alleged in this case. Cf. 1 Noah Webster, *An American Dictionary of the English Language* 58 (1828) (defining "depredation" as "[t]he act of plundering; a robbing; a pillaging").[5] Thus, although petitioners contend (Pet. 21) that the court of appeals' decision is inconsistent with the canon that ambiguity in treaty language is to be resolved in favor of the Indians, they make no effort to show that any language in the foregoing treaties or agreement is ambiguous. "The canon of construction regarding the resolution of ambiguities in favor of Indians * * * does not permit reliance on ambiguities that do not exist." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986).

The third document on which petitioners rely—the Grinnell Agreement—effected a cession of tribal land to

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junction with the preceding Article. Article 3 is naturally construed as obligating the United States "to protect the Tribes from depredations that occurred only on tribal land." *Id.* at 22.

[5] Petitioners quote the district court's statement that the serious adverse impacts of the Zortman-Landusky mines on tribal land and water resources is "undisputed." Pet. 12 (quoting Pet. App. 38); see Pet. 24. Earlier in the same opinion, however, the district court correctly noted that "[t]he government * * * disputes the Tribes' claim that mining has affected water quantity and water quality on the reservation." Pet. App. 33-34. BLM's stated view is that (1) the quality of water upstream from the reservation meets applicable health standards at the reservation boundary; (2) the Tribes have not shown that the quantity of water flowing onto the reservation from the Little Rocky Mountains is insufficient to meet their needs; and (3) Spirit Mountain (see Pet. 11 n.1), located on private land, was unavailable for traditional cultural practices and was covered by a dense grid of exploration roads and prospect pits that existed prior to the permitting of the Landusky mine by the State of Montana in 1979. See Gov't C.A. Opp. to Tribes' Pet. for Reh'g en Banc 15 n.11 (filed Feb. 9, 2007).

the United States in return for certain commitments from the government. See Pet. App. 90-95. The text of the agreement contains no language that can be construed to prohibit the governmental actions that are alleged to constitute a breach of trust in this case. Petitioners contend that a Senate document concerning the Grinnell Agreement "reflects, verbatim, the very specific understanding that the Indians of Fort Belknap had of [that agreement]." Pet. 24-25 n.7; see S. Doc. No. 117, 54th Cong., 1st Sess. (1896) (Pet. App. 99-172). The statements of three individual Indians on which petitioners rely (see Pet. App. 118-119, 121; Pet. 24-25 n.7), however, indicate only that some Indians were unwilling to "sell" the water in the lands ceded via the Grinnell Agreement and did not want the federal government to "shut off" that water. The court of appeals' construction of the agreement is consistent with those statements. Cf. *Fort Belknap Indian Community*, 11 Ind. Cl. Comm. 479, 489 (1962) (evidence does not establish that "there was any understanding and agreement between the parties that * * * water rights would be reserved from the area ceded").[9]

d. Petitioners contend (Pet. 26-29) that the government's trust responsibilities are effectively rendered nugatory if the plaintiff in a breach of trust suit is re-

[9] Petitioners also rely on another part of the Senate document concerning the Grinnell Agreement, which reflects that the federal commissioners assured the Fort Belknap Indians that they retained sufficient water for their "needs" and "uses." Pet. 24 n.7 (citing Pet. App. 104, 105). Petitioners have not contended in this case, however, that the operation of the Zortman and Landusky mines has deprived the Tribes of the quantity of water necessary to meet their "needs" or "uses." Rather, the Tribes have simply asserted that the operation of the mines has diminished the quantity and quality of water available to them. Pet. App. 7; see *id.* at 32-33, 44-45.

quired to establish a violation of some specific provision of law. That argument ignores the fact that specific provisions of treaties, statutes, and agreements are the means by which the United States *defines* its relationship with Indian Tribes, and therefore are the only proper source of legally enforceable obligations on the part of the United States. At the same time, however, those instruments afford Tribes substantial protection, as demonstrated by this Court's many decisions enforcing their provisions. The court of appeals' decision—declining to find legally enforceable trust obligations outside of the governing treaties, statutes, and agreements—thus scarcely "empties the trust obligation of all meaning." Pet. 27. Petitioners acknowledge, moreover, that the Ninth Circuit's analysis on this point is consistent with the D.C. Circuit's decisions in *North Slope Borough* v. *Andrus*, 642 F.2d 589, 611-612 (1980), and subsequent cases. See Pet. 27-28.

Petitioners' objection to the Ninth Circuit's approach is particularly misplaced in a case, like this one, that involves the management of *non-tribal* resources. Petitioners contend that, even if the land-management practices at issue in this case comply with all environmental statutes and regulations of general applicability, and with the treaty obligations that the United States has assumed to the Tribes, a court may declare the government to be in breach of trust obligations if the court deems BLM's practices insufficiently protective of tribal interests. Petitioners, however, point to no source of constitutional authority for courts to impose binding legal obligations on the United States, unanchored in any source of positive law, based on judicially-crafted common-law notions and generalized considerations of a relationship of trust or guardianship between the

United States and Indians in a historical, political, or moral sense. A vast number of federal actions, moreover, could be alleged to have some indirect impact on tribal resources. Petitioners identify no workable standard by which a court could determine when the trust responsibilities they posit preclude the government from undertaking otherwise-lawful actions not involving the management of tribal property. Cf. *Navajo Nation*, 537 U.S. at 506.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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